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United States
Court of Appeals
for the Ninth Circuit

ELMER F. SHEPARD and KATHYRN SHEPARD, His Wife,

Appellants,

vs.

CAL-NINE FARMS, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona

FILED

SEP 13 1957

PAUL P. O'BRIEN, Clerk

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-30-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Arizona

No. 2343

CAL-NINE FARMS, a Corporation,

Plaintiff,

vs.

ELMER F. SHEPARD & KATHRYN M. SHEPARD, His Wife,

Defendants.

COMPLAINT

Comes Now plaintiff and complains of defendants as follows:

First Count

I.

Plaintiff is a corporation organized and existing under the laws of California, and is a citizen of California. Defendants are citizens and residents of Arizona. The amount in controversy in this case exceeds $3,000.00 exclusive of interest and costs.

II.

On or about November 18, 1954, plaintiff entered into an option agreement with defendant Elmer F. Shepard, whereby in consideration of the payment of $2,000.00 plaintiff was given an option for two months to purchase that certain land in Maricopa County more particularly described as follows:

The North ½ of Sec. 21, Township 1 North, Range 9 West, Gila & Salt River Base & Meridian.

III.

On or about January 11, 1955, plaintiff exercised its option rights under the agreement referred to in Paragraph II and agreed with defendants to purchase said land together with the following described personal property, which under certain escrow instructions, hereinafter referred to, was considered to be a part of the real property:

> Pomona Deep Well Turbine, Pump, 360 feet of column, tubing and shaft, Serial #PM3885; Superior 60510 Natural Gas Engine, Serial #15350; and Fairbanks Horse Gear Head FN6A 1:2 ratio WLS Watson Splicer Drive w/f flanges, Serial #PN219.

for a price of $80,000 payable as follows: $18,000 down, $2,000 paid for option credited on purchase price, principal balance of $60,000 payable in seven annual installments commencing February 1, 1956, and progressing in amount from $7,000 in 1956 to $10,500 in 1962, together with annual installments of interest at the rate of 5% per annum on the unpaid balance. This agreement of purchase was evidenced by certain escrow instructions signed by plaintiff and defendants on January 11, 1955, and directed to the Phoenix Title & Trust Company as escrow agent. Said land and property was then owned by defendants as community property.

IV.

Plaintiff has paid to defendants the sum of $20,000 as required by the agreement referred to in

Paragraph III, and has performed all of the things required of it by said contract.

V.

Immediately prior to the execution of the option agreement referred to in Paragraph II, during the negotiations prior to said execution, defendant Elmer Shepard made the following warranties and representations to plaintiff's agents, Ernest Otto & Henry Haas:

(a) He represented that the well on said land was in good working order and in good state of repair.

(b) He represented that the well on said land was capable of pumping an average of twenty-two hundred (2,200) gallons per minute, and would continue to have such capacity.

VI.

Each of said warranties and representations was a part of defendants' undertaking and promise under the land purchase agreement referred to in Paragraph III, and was bargained for by plaintiff in entering into said agreement.

VII.

Each of said warranties and representations was false, said well being in bad and steadily deteriorating condition, and incapable of pumping twenty-two hundred (2,200) gallons per minute at the time the land was turned over to plaintiff.

VIII.

Defendant Elmer Shepard knew the same were false, or made the same in reckless or negligent ignorance and disregard of whether they were true or false.

IX.

Defendant made said representations wantonly, wilfully and maliciously, with intent that they should be relied upon by plaintiff's agents, said Otto & said Haas, and acted on by said agents who would be induced thereby to pay the purchase price of $80,000 for said land.

X.

Said representations and warranties were material to the above-described transaction regarding said land, in that the condition and capacity of a well on desert land is an important and often controlling factor in the value of such land.

XI.

Plaintiff's agents were ignorant of the falsity of said representation and warranties, believed the same to be true, and relied thereon in entering into the agreement above described for the sale of said land.

XII.

Plaintiff's agents were prevented by defendant Elmer Shepard from ascertaining the truth as to said representations, and plaintiff's agents further made such other investigation as they reasonably could as to the truth of said representations, all without learning of the falsity of said representations.

XIII.

As a direct and proximate result of the above described misrepresentations of defendant Elmer Shepard, plaintiff has been forced to drill a new well and install new equipment therein, all to plaintiff's damage in the amount of $22,500.00.

XIV.

As a direct and proximate result of the above-described misrepresentation of defendant Elmer Shepard, plaintiff suffered a partial failure of its cotton crop grown on said land, as a result of lack of water, all to plaintiff's damage in the amount of $23,025.00. Defendant Elmer Shepard knew that plaintiff contemplated raising cotton on said land, and he further knew that an adequate supply of water was essential for a cotton crop.

Wherefore, plaintiff prays that:

1. It have judgment against defendants in the amount of forty-five thousand five hundred twenty-five dollars ($45,525.00) actual damages;

2. It have judgment against defendants for twenty thousand dollars ($20,000.00) punitive and exemplary damages;

3. It recover its costs herein expended;

4. It have such other relief as to the Court may seem just and proper.

RAGAN & REHNQUIST,

By /s/ WILLIAM H. REHNQUIST,

Attorneys for Plaintiff.

[Endorsed]: Filed December 15, 1955.

[Title of District Court and Cause.]

ANSWER

Come Now the defendants, and for answer to plaintiff's complaint, admit, deny and allege as follows:

I.

Admit the allegations of paragraphs I, II and III of plaintiff's complaint.

II.

Deny the allegations of paragraphs IV, V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of plaintiff's complaint.

III.

Defendants allege that the option to purchase referred to in plaintiff's complaint, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof by reference as if set out at length herein, and the escrow instructions to Phoenix Title & Trust Company, Escrow No. 522656, dated January 11, 1955, a copy of which is attached hereto, marked Exhibit "B" and made a part hereof by reference as if set out at length herein, constitute the entire agreement between the parties for the sale of the property described in plaintiff's complaint, and that no other, further or different agreement, whether oral or written, exists between the parties; that no representations, warranties or undertakings were made to plaintiff by these defendants, or either of them.

Wherefore, defendants pray that plaintiff take nothing by its complaint; that defendants be awarded their costs necessarily incurred herein, and for such other and further relief as the court deems proper in the premises.

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,
Attorneys for Defendants.

EXHIBIT A

(Copy.)

OPTION TO PURCHASE

This Agreement, made this 17th day of November, 1954, by and between E. F. Shepard, of Buckeye, Arizona, hereinafter called first party, and Ernest H. Otto and Henry Haas, hereinafter called second parties, Witnesseth:

Whereas, the first party is the owner of certain real estate situated in Maricopa County, State of Arizona, described as follows:

> The North Half of Section 21, Township One North, Range Nine West, G&SRB&M, Maricopa County, Arizona,

and the following personal property:

1. House trailer and furnishings.
2. Approximately 100 irrigation siphon tubes.

And Whereas, the second parties desire an option to purchase said real and personal property:

Now Therefore, the first party, in consideration of Two Thousand and No/100 Dollars ($2,000.00) duly paid by the second parties, receipt of which is hereby acknowledged, agrees to sell and convey to the second parties and to their successors or assigns, at any time before twelve o'clock noon, on January 17, 1955, the following described real estate situated in the County of Maricopa, State of Arizona, to wit:

The North Half of Section 21, Township One North, Range Nine West,

including the following personal property:

1. House trailer and furnishings.
2. Approximately 100 irrigation siphon tubes.

for the price of Eighty Thousand and No/100 Dollars ($80,000.00), good and lawful money of the United States of America, payable as follows:

A down payment of Twenty Thousand and No/100 Dollars ($20,000) upon acceptance of said option, the Two Thousand Dollar ($2,000.00) payment under option shall be credited on the down payment.

The balance with interest at 5% payable as follows:

$7,000.00 plus interest on or before February 1, 1956

$7,500.00 plus interest on or before February 1, 1957

$8,000.00 plus interest on or before February 1, 1958

$8,500.00 plus interest on or before February 1, 1959

$9,000.00 plus interest on or before February 1, 1960

$9,500.00 plus interest on or before February 1, 1961

$10,500.00 plus interest on or before February 1, 1962

It is further agreed that if the second parties exercise the option to purchase the said property, under the terms aforesaid, on or before the date of expiration as provided herein, the first party will place said agreement and sale in escrow with a Title Company.

The first party further agrees not to sell or offer for sale the above-described real estate during the life of this option.

It is further agreed that time is of the essence of this contract, and that unless the second parties shall tender their acceptance of said offer to sell by said first party as above set out on or before the 17th day of January, 1955, this contract shall expire and terminate by limitation, and a failure on the part of the second parties, their successors or assigns, to perform the conditions provided herein, shall work as a forfeiture of all money paid as a consideration for this agreement, and the said consideration shall be retained by the first party as

full payment and settlement for the option granted by this instrument.

This agreement shall constitute the entire contract between the parties hereto, and no modification hereof, shall be binding unless indorsed hereon in writing and no agent, salesman, or person other than an officer of the second parties, is or shall be authorized to modify the terms of this instrument or to change any of the provisions hereof.

Witness Our Hands this 18th day of November, 1954.

/s/ E. F. SHEPARD,

/s/ ERNEST H. OTTO,

/s/ HENRY HAAS.

State of Arizona,
County of Maricopa—ss.

On this, the 18th day of November, 1954, before me, the undersigned Notary Public, personally appeared E. F. Shepard, Ernest H. Otto, and Henry Haas, known to me to be the persons whose names are subscribed to the foregoing instrument and who acknowledged to me that they executed the same for the purpose therein contained.

[Seal] RUTH S. BRINCK,
Notary Public.

My Commission Expires May 14, 1956.

EXHIBIT B

ESCROW INSTRUCTIONS TO—PHOENIX TITLE AND TRUST COMPANY

MAIN OFFICE - TITLE & TRUST BUILDING

c o p y

Escrow No. 522656

PHOENIX, ARIZONA, January 11, 19 55 ESCROW OFFICER V. R. Engel/ewc

E. F. SHEPARD & KATHRYN M. SHEPARD, his wife HEREIN CALLED SELLER

whose address is Buckeye, Arizona Phone

and

CAL-NINE FARMS, a California corporation HEREIN CALLED BUYER

whose address is C/o Ernest H. Otto, Buckeye, Ariz. (Home Office, 2965 McKinley Ave. Fresno, Calif. Phone

hereby employ Phoenix Title and Trust Company to act as Escrow Agent in connection with a sale by Seller to Buyer upon the following terms and conditions which shall be complied with by said parties on or before

60 days from date 19 except as otherwise specified herein.

The property herein referred to is situated in [redacted] County, Arizona, and is described as follows, to-wit:

Maricopa

The North Half of Section 21, Twp. 1 North,
Range 9 West of the G&SRB&M.

SELLER:

1. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.

SELLER AND BUYER:

2. Will deliver to Escrow Agent all documents, pay to Escrow Agent all sums and do or cause to be done all other things necessary, in the sole judgment of Escrow Agent, to enable it to comply herewith and to enable Phoenix Title and Trust Company to issue any title insurance policy provided for herein.

3. Should these instructions contemplate a transfer of an interest in an agreement for sale, Seller and Buyer will deliver to Escrow Agent such documents as Escrow Agent may, in its sole judgment, require for the benefit of any party to said agreement.

4. Authorize Escrow Agent to pay, from any funds held by it for their respective credit hereunder, all amounts necessary to procure the delivery of such documents and to pay, on their behalf, all charges and obligations payable by them respectively, as specified herein.

5. Will each pay to Escrow Agent, upon demand, all charges payable by them respectively, as provided herein.

6. Authorize Escrow Agent to execute, on their behalf, form assignments, or otherwise order changes in any insurance called for herein other than title insurance and forward the policies to insurer's agent with the request that insurer consent to such transfer, attach loss payable clause or make such other additions or corrections as may be specifically required herein, and that said agent thereafter return such policies to Escrow Agent or to the parties entitled thereto.

7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

8. Authorize Escrow Agent, in the event any demand is made upon it concerning these instructions or the escrow, at its election, to hold any money and documents deposited hereunder until an action shall be brought in a court of competent jurisdiction to determine the rights of Seller and Buyer or to interplead said parties by an action brought in any such court. Deposit by Escrow Agent of said documents and funds, after deducting therefrom its charges and its expenses and attorney's fees incurred in connection with any such court action, shall relieve Escrow Agent of all further liability and responsibility.

9. Will indemnify and save harmless Escrow Agent against all costs, damages, attorney's fees, expenses and liabilities, which it may incur or sustain in connection with these instructions or the escrow or any court action arising therefrom and will pay the same upon demand.

10. Grant to Escrow Agent a lien upon and authority to reimburse itself for its charges and for any damages or expenses which it may incur or sustain in connection herewith, from all of the rights, title and interest of Seller and Buyer in all of the documents and money deposited hereunder.

11. Direct that no notice, demand or change in these instructions shall be of effect unless given in writing and that these instructions, and any subsequent instructions, given mutually by Seller and Buyer to Escrow Agent in connection herewith shall constitute the complete escrow instructions, notwithstanding any agreement which Seller and Buyer may have concerning the property.

12. Direct that all money payable hereunder be paid to Escrow Agent which, upon receipt thereof, shall deposit such funds in an Arizona Bank, in a general escrow account from which all disbursements shall be made by check of Escrow Agent. Escrow Agent shall be under no obligation to disburse any funds by check or draft, and no check or draft shall be payment to Escrow Agent in compliance with any of the requirements hereof, until it is advised by the bank in which deposited that such check or draft has been honored, unless Escrow Agent specifically agrees in writ-

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now plaintiff and complains of defendants as follows:

First Count

I.

Plaintiff is a corporation organized and existing under the laws of California, and is a citizen of California. Defendants are citizens and residents of Arizona. The amount in controversy in this case exceeds $3,000.00 exclusive of interest and costs.

II.

Plaintiff brings this action in its own right and as assignee of the rights of Ernest Otto and Henry Haas.

III.

On or about November 18, 1954, said Ernest Otto and Henry Haas entered into an option agreement with defendant Elmer F. Shepard, whereby in consideration of the payment of $2,000.00 plaintiff was given an option for two months to purchase that certain land in Maricopa County more particularly described as follows:

The North ½ of Sec. 21, Township 1 North, Range 9 West, Gila & Salt River Base & Meridian.

Otto and Haas took this option with the intent that it be taken up by plaintiff, a corporation which they contemplated forming under the laws of California.

IV.

On or about January 11, 1955, plaintiff exercised its option rights under the agreement referred to in Paragraph III and agreed with defendants to purchase said land together with the following described personal property, which under certain escrow instructions, hereinafter referred to, was considered to be a part of the real property:

> Pomona Deep Well Turbine, Pump, 360 feet of column, tubing and shaft, Serial No. PM3885; Superior 60510 Natural Gas Engine, Serial No. 15350; and Fairbanks Horse Gear Head FN6A 1:2 ratio WLS Watson Splicer Drive w/f flanges, Serial No. PN219

for a price of $80,000 payable as follows: $18,000 down, $2,000 paid for option credited on purchase price, principal balance of $60,000 payable in seven annual installments commencing February 1, 1956, and progressing in amount from $7,000 in 1956 to $10,500 in 1962, together with annual installments of interest at the rate of 5% per annum on the unpaid balance. This agreement of purchase was evidenced by certain escrow instructions signed by plaintiff and defendants on January 11, 1955, and directed to the Phoenix Title & Trust Company as escrow agent. Said land and property was then owned by defendants as community property.

V.

Plaintiff has paid to defendants the sum of $20,000 as required by the agreement referred to in

Paragraph IV, and has performed all of the things required of it by said contract.

VI.

Immediately prior to the execution of the option agreement referred to in paragraph III, during the negotiations prior to said execution, defendant Elmer Shepard made the following warranties and representations to Otto and Haas, who were plaintiff's agents and are plaintiff's assignors:

(a) He represented that the well on said land was in good working order and in a good state of repair.

(b) He represented that the well on said land was capable, on an average, of pumping twenty-two hundred (2200) gallons per minute and would continue to have such a capacity for a reasonable time.

(c) He concealed from Otto and Haas the history and condition of said well.

VII.

Each of said warranties and representations was a part of defendants' undertaking and promise under the land purchase agreement referred to in Paragraph IV, and was bargained for by plaintiff in entering into said agreement.

VIII.

Each of said warranties and representations was false, said well being in bad and steadily deteriorating condition, and incapable of pumping twenty-two hundred (2,200) gallons per minute at the time

23. If, under these instructions, a commission is to be paid to a real estate Agent, then, notwithstanding any conflicting provision herein contained:

(a) The party obligated to pay the commission shall not acquiesce in any mutual cancellation of these instructions without having first delivered said real estate Agent's written consent to Escrow Agent.

(b) Upon the cancellation of these instructions for any reason, should any funds, after deducting Escrow Agent's charges, become payable to a party obligated hereunder to pay said commission, then Escrow Agent shall pay to the real estate Agent therefrom, a sum equal to one-half of the earnest money deposited by any other party and payable to the party so obligated, but not more than the full amount of such commission.

24. If Escrow Agent is unable or unwilling to comply with these instructions for any reason other than cancellation as hereinbefore provided, or if Phoenix Title and Trust Company is unwilling to issue any title insurance policy provided for herein, Escrow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller.

AGREEMENTS FOR SALE OF REAL PROPERTY:

25. Should any part of the amount provided to be paid by Buyer be evidenced by an agreement for sale, an executed copy thereof, the deed herein provided to be furnished by Seller, a deed of the property from Buyer to Seller and such other documents as Escrow Agent may, in its sole judgment, require will be delivered by Seller and Buyer to Escrow Agent which shall record said agreement and hold said deeds until such time as all sums due for the account of Seller under said agreement for sale have been paid and the instructions herein have been met, at which time Escrow Agent shall deliver said deeds and other documents to Buyer.

26. If Buyer is in default under such agreement, Seller may either elect to bring an action against Buyer for specific performance of agreement or enforce a forfeiture thereof in any lawful manner, including, but not limited to, forfeiture by notice as hereinafter provided, but only after the expiration after such default of the following periods:

27. Where Buyer has paid on the purchase price: Less than 20%—30 days; 20% or more, but less than 30%—60 days; 30% or more, but less than 50%—120 days; 50% or more—9 months. In computing said percentages, the amount of any agreement for sale or mortgage agreed to be paid by Buyer shall be treated as payment only to the extent of principal actually paid thereon by Buyer.

28. If Seller elects to forfeit such agreement by notice, Seller shall do so through Escrow Agent by delivering to Escrow Agent a written declaration of forfeiture directed to Buyer together with a fee of $5.00. Escrow Agent shall, within three days thereafter, send a copy of said declaration to Buyer in the manner provided herein for the mailing of Notices, Demands or Declarations.

29. If Buyer fails to comply with the terms of such agreement to the date of such compliance before the expiration of ten days from the date said copy was deposited in the United States mail as herein provided. Escrow Agent is authorized to deliver to Seller the documents and money deposited under these instructions or under such agreement.

30. Seller and Buyer shall pay the following amounts to Escrow Agent for its services in receiving, accounting for, and remitting funds received under such agreement: If agreement is fully performed within one year from its date $5.00 each; if agreement is not fully performed within one year from its date, $5.00 each at the end of the first year and a like sum at the end of each succeeding year or fraction thereof prior to full performance, except that if Buyer shall have paid in any one year of said agreement a sum in excess of $5,000.00, Seller shall pay to Escrow Agent a sum equivalent to one-tenth of one per cent of such payment in lieu of said $5.00 payable by Seller. If such agreement is terminated by mutual consent prior to performance in full thereof, Buyer and Seller shall pay Escrow Agent $5.00 each as a termination charge.

31. If disbursements are made to other than the parties hereto by reason of death, insolvency, bankruptcy, or in-

Buyer shall have paid in any one year of said agreement a sum in excess of $5,000.00, Seller shall pay to Escrow Agent a sum equivalent to one-tenth of one per cent of such payment in lieu of said $5.00 payable by Seller. If such agreement is terminated by mutual consent prior to performance in full thereof, Buyer and Seller shall pay Escrow Agent $5.00 each as a termination charge.

31. If disbursements are made to other than the parties hereto by reason of death, insolvency, bankruptcy, or incompetency of Seller, or by reason of any legal proceedings, Escrow Agent shall be paid an additional charge of $10.00.

NOTICES, DEMANDS OR DECLARATIONS:

32. The respective addresses of Seller and Buyer as set forth herein or the last notice of change thereof filed with Escrow Agent by the respective parties, shall be used by Escrow Agent in mailing any Notice, Demand or Declaration to either party.

33. If, for any reason, a Notice, Demand or Declaration of any kind is to be given by either party to the other party, said Notice, Demand or Declaration shall be in writing, signed by the party giving the Notice or making the Demand or Declaration and directed to the other party and shall be filed with Escrow Agent. Escrow Agent shall within three days after receipt of said Notice, Demand or Declaration, send it to the party to whom it is directed by enclosing a copy of said instrument in an envelope addressed to said party at the last address which said party shall have filed with Escrow Agent, or, if no address has been so filed, to said party, in care of General Delivery, at the City in which the office of Escrow Agent is located as shown on the first page of these instructions, and depositing said envelope with proper postage affixed thereto in the United States mail.

34. The mailing of any such instrument by Escrow Agent in the manner herein provided shall constitute notice of the contents of such instrument to the party to whom the instrument is directed as of the date of such mailing and no further notice thereof shall be required.

DEFINITIONS:

35. The words "charges" as used herein, refers to all charges and advances made and obligations incurred by Escrow Agent in connection herewith, and all charges of Phoenix Title and Trust Company in connection with the issuance of its title insurance policy or the cancellation of any order therefor.

36. The word "property" as used herein, refers to the real property described in and which is the subject of these escrow instructions.

37. The word "party" as used herein, refers to Seller or Buyer as the case may be.

38. The phrase "Seller and Buyer" as used herein, refers to Seller and Buyer both jointly and severally unless otherwise specified.

39. The day provided herein within which compliance with any requirement must be met shall end at the close of the then regularly established public business hours of Escrow Agent for such day, provided, should Escrow Agent be closed during any of said business hours on said day such requirement may be met on the next succeeding day on which Escrow Agent is open for business throughout said business hours.

TITLE INSURANCE:

40. The title insurance provided for herein, shall be subject to the conditions of and evidenced by the regular form of owner's title insurance policy of Phoenix Title and Trust Company with a limit of liability equal to the total amount to be paid by Buyer. Said policy, upon issuance, shall insure Buyer against loss by reason of defects in the title to the property on the date of filing for record of the documents as provided herein subject to such of the following exceptions as may be applicable in addition to the regular printed exceptions contained in Schedule "B" thereof:

(a) Taxes and assessments payable by Buyer as set forth herein;

(b) Building and other restrictive covenants to which the property is subject;

(c) Easements and rights of way for roadways, canals, laterals, ditches and Public Utilities over and across the property;

(d) Mortgages referred to herein;

(e) Rights of parties under the agreement for sale referred to herein;

(f) Rights of Buyer under the agreement for sale provided for herein;

(g) Any liens or encumbrances affecting said property suffered or incurred through any act or fault of the party insured or anyone deriving an interest in said property by or through the said party insured;

(h) Liabilities and obligations imposed on the land by inclusion in any water or irrigation district.

41. NOTE: There are some matters which Phoenix Title and Trust Company does not attempt to investigate or determine and for which it assumes no liability. While not a complete list, experience has shown that among these, the following deserve your particular consideration:

(a) Unrecorded mechanic's and material men's liens.

(b) Current personal property taxes.

(c) Utility charges, such as electric, gas, water and sewer.

(d) Charges for irrigation water and power.

(e) Boundary lines, location of improvements and possession.

(f) Compliance with limitations on use of the property, such as zoning and building ordinances and building and other restrictions.

(g) Premiums for fire insurance policies provided for herein. (It is your obligation to determine that such premiums are paid and that such policies are in effect).

(h) Reservations and exceptions in Patents, such, for example, as oil or mineral reservations.

The total consideration herein includes the following equipment, which is considered to be a part of the real property:

Pomona Deep Well Turbine, Pump, 360 feet of column, tubing and shaft, Serial #PM3885;

		All items checked thus (✓) or (X) are the obligations which each party will pay	SELLER	BUYER
SALES PRICE TO BE PAID BY BUYER	$ 80,000.00	TAXES 1954 & prior	V	—
Which is represented by:		1955 & subsequent		V
EARNEST MONEY TO BE DEPOSITED IN ESCROW		IMPROVEMENT LIEN ASSESSMENTS		
Paid direct to seller, receipt ack.	$ 2,000.00	none		
Herewith	$ 18,000.00			
CASH PAYMENT TO BE DEPOSITED IN ESCROW		IRRIGATION PROJECT ASSESSMENTS		
	$ none	none		—
	$			
MORTGAGE OF RECORD beginning with payment due - with approximate unpaid balance of with interest at %	$ none	FIRE INSURANCE TO BE PROVIDED in the sum of $ none		
		ADJUSTMENTS: Taxes 2/1/55 on 1954 figures		
AGREEMENT FOR SALE under escrow No. beginning with payment due with approximate unpaid balance of with interest at %	$ none	in the sum of $ none		
		ADJUSTMENTS: Taxes 2/1/55 on 1954 figures		
(Any variation in amount of mortgage or agreement for sale shall be reflected in)		Improvement liens etc none		
		Water Assessments none		
		Fire Insurance Premiums none		
		Interest none		
(Any reserve funds held under said mortgage or agreement shall be		Rents none		
		RECORDING FEES:		
		Deed		V
		Mortgage		V
BALANCE OF	$ 60,000.00	Agreement		
Evidenced By Note & 1st mtge		Release of Mtge.		
Payable as follows:		STAMP TAX ON DEED	V	
$7000.00 plus interest on or before 2/1/56;		AGENT'S COMMISSION $ none		
$7500.00 plus interest on or before 2/1/57;		TO		
$8000.00 plus interest on or before 2/1/58;				
$8500.00 plus interest on or before 2/1/59;		ESCROW CHARGES 1/2 & 1/2	V	V
$9000.00 plus interest on or before 2/1/60;		TITLE INSURANCE CHARGES:		
$9500.00 plus interest on or before 2/1/61; and $10,500.00 plus interest on or before 2/1/62; with interest on all unpaid principal at 5% per annum from 2/1/55, payable annually and in addition to payments on principal.		Owners Policy	V	
		Mortgagee Policy		V
		ANNUAL COLLECTION CHARGES none-to be paid direct		
Upon recordation of instruments, title insurance policy to insure title of Buyer herein		PERSONAL PROPERTY is to be transferred as a part of this transaction, and a Bill of Sale will be handed to Escrow Agent for delivery to Buyer. See over		
PROCEEDS OF CASH PAYMENTS TO BE PAID TO E. F. Shepard and Kathryn M. Shepard				
FUTURE PAYMENTS UNDER AGREEMENT FOR SALE TO BE PAID TO		Escrow Agent is to assume no liability as to the sufficiency of said Bill of Sale or as to the title of said personal property.		

Exhibit "B"

12. Direct that all money payable hereunder be paid to Escrow Agent which, upon receipt thereof, shall deposit such funds in an Arizona Bank, in a general escrow account from which all disbursements shall be made by check of Escrow Agent. Escrow Agent shall be under no obligation to disburse any funds by check or draft, and no check or draft shall be payment to Escrow Agent in compliance with any of the requirements hereof, until it is advised by the bank in which deposited that such check or draft has been honored, unless Escrow Agent specifically agrees in writing to accept liability for the sufficiency thereof.

13. Authorize Escrow Agent to act upon any statement furnished by the holder or payee, or a collection agent for the holder or payee, of any lien on or charge or assessment in connection with the property, concerning the amount of such charge or assessment or the amount secured by such lien without liability or responsibility for the accuracy of such statement.

14. Direct that when these instructions have been complied with and Phoenix Title and Trust Company is willing to issue its title insurance policy, as hereinafter provided, and when Escrow Agent's charges have been paid, it shall deliver, by filing for record in the appropriate public office, all necessary documents required to be filed or recorded, instructing the County Recorder's Office to mail any documents recorded therein to the parties entitled thereto at the addresses given herein, at which time Escrow Agent shall disburse all funds paid to it hereunder, as provided herein. Any other papers or documents may, at the option of Escrow Agent, be delivered to the party entitled thereto by mailing in the manner herein provided for mailing of "Notices, Demands or Declarations."

15. Agree that the employment of Phoenix Title and Trust Company, as Escrow Agent, shall not affect any rights to which it may be subrogated under the terms of any title insurance policy issued pursuant to the provision thereof.

CANCELLATION:

16. If either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.

17. When such written notice is delivered to Escrow Agent by the party so electing to cancel, Escrow Agent shall within three days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notices, Demands or Declarations.

18. In the event said other party shall fail within said thirteen-day period to comply with all of the terms hereof, these instructions shall become cancelled and Escrow Agent is thereupon authorized:

19. First: To pay to the party electing to cancel, any earnest money deposited hereunder by said other party, after deducting any charges;

20. Second: To pay to said other party, any other money deposited hereunder by said other party, after deducting any charges remaining unpaid;

21. Third: To pay to the party electing to cancel, any money deposited by said party, after deducting any charges remaining unpaid;

22. Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of Escrow Agent.

the land was turned over to plaintiff. Contrary to the statements of defendant Shepard, said well had a history of costly and unsatisfactory repairs.

IX.

Defendant Elmer Shepard knew the same were false, or made the same in reckless or negligent ignorance and disregard of whether they were true or false.

X.

Defendant made said representations wantonly, wilfully and maliciously, with intent that they should be relied upon by plaintiff's agent, said Otto and said Haas, and acted on by said agents in that plaintiff would be induced to pay the purchase price of $80,000 for said land.

XI.

Said representations and warranties were material to the above-described transaction regarding said land, in that the condition and capacity of a well on desert land is an important and often controlling factor in the value of such land.

XII.

Plaintiff's agents were ignorant of the falsity of said representation and warranties, believed the same to be true and relied thereon in entering into the agreement above described for the sale of said land.

XIII.

Plaintiff's agents were prevented by defendant Elmer Shepard from ascertaining the truth as to

said representations, and plaintiff's agents further made such other investigation as they reasonably could as to the truth of said representations, all without learning of the falsity of said representations.

XIV.

As a direct and proximate result of the above-described misrepresentations of defendant Elmer Shepard, plaintiff has been forced to drill a new well and install new equipment therein, all to plaintiff's damage in the amount of $22,500.00.

XV.

As a direct and proximate result of the above-described misrepresentation of defendant Elmer Shepard, plaintiff suffered a partial failure of its cotton crop grown on said land, as a result of lack of water, all to plaintiff's damage in the amount of $23,025.00. Defendant Elmer Shepard knew that plaintiff contemplated raising cotton on said land, and he further knew that an adequate supply of water was essential for a cotton crop.

Wherefore, plaintiff prays that:

1. It have judgment against defendants in the amount of forty-five thousand five hundred twenty-five dollars ($45,525.00) actual damages;

2. It have judgment against defendants for twenty thousand dollars ($20,000.00) punitive and exemplary damages;

3. It recover its costs herein expended;

The total consideration herein includes the following equipment, which is considered to be a part of the real property:

Pomona Deep Well Turbine, Pump, 360 feet of column, tubing and shaft, Serial #PM3885;
Superior 6G510 Natural Gas Engine, Serial #15350; and Fairbanks Morse Gear Head FN6A 1:2 ratio WL8 Watson Splicer Drive w/f flanges, Serial #PN219.

The total sales price also includes the following personal property; House trailer with furnishings in trailer, including Servel refrigerator; and approximately 100 irrigation siphon tubes. This personal property is to be considered to belong to buyer when the deed and mortgage are recorded, the cash payment disbursed, and this escrow closed. No bill of sale is required.

(The house trailer is not being used on the highway and no certificate of title is to be transferred through this escrow.) The parties hereto understand that Phoenix Title and Trust Company makes no representations as to personal property.

The seller herein recognizes that buyer has exercised that certain option dated 11/17/54, between E.F. Shepard, first party and Ernest H. Otto and Henry Haas, second parties, by the execution of these escrow instructions and the deposit of balance of option funds.

CAL-NINE FARMS

E. F. SHEPARD
Seller

By ERNEST H. OTTO
Buyer

KATHRYN M. SHEPARD
Seller

By HENRY HAAS
Buyer

Endorsed: Filed December 30, 1955.

ISM 9-55 ©

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4. It have such other relief as to the Court may seem just and proper.

RAGAN & REHNQUIST,

By /s/ WILLIAM H. REHNQUIST,
Attorneys for Plaintiff.

[Endorsed]: Filed May 17, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY—THURSDAY, MAY 17, 1956

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly this day for trial. Keith Ragan, Esq., and William Rehnquist, Esq., are present for the plaintiff. Haze Burch, Esq., appears as counsel for the defendants.

Counsel for the plaintiff presents and files Motion for Leave to File Amended Complaint.

It Is Ordered that said motion is granted and that defendants be allowed to file answer to amended complaint at a later date.

Counsel for the defendants reads into the record an answer to amended complaint.

The rule on witnesses is invoked and the following witnesses are sworn and excluded from the Courtroom:

Robert H. Theibeau
Roosevelt Brooks
Ernest H. Otto
H. Walker Harrison
Ernest Wood
Mark Makin
Henry Haas
Elmer F. Shepard

Henry Haas and Elmer F. Shepard are excepted from the Rule.

Plaintiff's Case:

Ernest H. Otto is called and examined on behalf of the plaintiff.

The following plaintiff's exhibits are admitted in evidence:

1—Option agreement to purchase.
2—Escrow Instructions.
3—Bill.
4—Bills.
5—Bills.
6—Bills.
7—Bills.

At 12:00 o'clock noon, It Is Ordered that the further trial of this case is continued to 2:00 o'clock p.m.

Subsequently, at 2:00 o'clock p.m., the parties and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Ernest H. Otto is recalled and further examined on behalf of the plaintiff.

Elmer F. Shepard is called and cross-examined as an adverse party.

Gordon Cameron is sworn and examined on behalf of the plaintiff.

The following Plaintiff's exhibits are admitted in evidence:

8—Assignment.
9—Bills of State Tractor & Equipment Co.
10—Statements of State Tractor & Equipment Co.
11—Statement of Gordon Cameron.
12—Record of State Land Department.
13—Record of State Land Department.
14—Photostats of Log of Gordon Cameron.

At 4:20 o'clock p.m., It Is Ordered that the further trial of this case is continued to Friday, May 18, 1956, at 10:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY—FRIDAY, MAY 18, 1956

Honorable Dave W. Ling, United States District Judge, presiding.

The parties and counsel are all present pursuant to recess and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Gordon Cameron is recalled and further examined on behalf of the plaintiff.

Kenneth Brown is sworn and examined on behalf of the plaintiff.

Elmer F. Shepard is recalled and further examined as an adverse party.

Plaintiff's exhibit 15, Statements, is admitted in evidence.

Robert Lamford is sworn and examined on behalf of the plaintiff.

Mark Makin, heretofore sworn, is called and examined on behalf of the plaintiff.

Henry Haas heretofore sworn, is called and examined on behalf of the plaintiff.

At 11:55 o'clock a.m., It Is Ordered that the further trial of this case is continued to 2:00 o'clock p.m.

Subsequently, at 2:00 o'clock p.m., the parties and counsel are all present pursuant to recess and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Plaintiff's exhibit 16, Cotton Loan Program Schedules, is admitted in evidence.

Simcoe Walmsley is sworn and examined on behalf of the plaintiff.

Plaintiff's exhibit 17, Memorandum, is admitted in evidence.

James R. Carter is sworn and examined for the plaintiff.

Plaintiff's exhibit 18, Flow Chart, is admitted in evidence.

Verner A. Tower is sworn and examined for the plaintiff.

C. K. Roberts is sworn and examined for the plaintiff.

Plaintiff's exhibit 19, Certificate of Corporation Commission, is admitted in evidence.

The plaintiff rests.

Counsel for the defendant moves for judgment for the defendant and states his grounds therefor.

It Is Ordered that said motion for judgment is denied.

Defendants' Case:

The following defendants' witnesses are called and examined:

Robert H. Thiebeau
Roosevelt Brooks

At 3:20 o'clock p.m., It Is Ordered that the further trial of this case is continued to Monday, May 21, 1956, at 2:30 o'clock p.m.

[Title of District Court and Cause.]

MINUTE ENTRY—MONDAY, MAY 21, 1956

Honorable Dave W. Ling, United States District Judge, presiding.

The parties and counsel are all present pursuant to recess and further proceedings of trial are had as follows:

Defendants' Case Continued:

Francis J. Lancey is sworn and examined on behalf of the defendants.

Defendants' exhibit A, Statement, is admitted in evidence.

Ernest Wood, heretofore sworn, is called and examined for the defendant.

The following defendants' witnesses are sworn and examined:

Lyman Miller
William Kimes

Lyman Miller is recalled and further examined on behalf of the defendants.

Elmer F. Shepard is called and examined on behalf of the defendants.

The defendants rest.

Rebuttal:

Ernest H. Otto is recalled and further examined for the plaintiff.

It Is Ordered that the record show the deposition of Elmer F. Shepard may be considered in evidence on stipulation.

Both sides rest.

It Is Ordered that the record show this case will be submitted upon the filing of briefs; that plaintiff is allowed 20 days to file opening brief, the defendant 20 days to answer and the plaintiff 10 days to reply.

[Title of District Court and Cause.]

MINUTE ENTRY
FRIDAY, NOVEMBER 23, 1956

Honorable Dave W. Ling, United States District Judge, presiding.

This case having been submitted and by the court, taken under advisement,

It Is Ordered that judgment will be entered for the plaintiff in the sum of $35,106.40. Of this amount $22,606.40 is the cost of a new well and the balance, $12,500.00, is for crop damages.

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY PLAINTIFF

I.

Defendants object to proposed Findings of Fact, numbered I to XVIII, for the reason that the same are not supported by the evidence.

II.

Defendants object to each of the proposed Conclusions of Law, numbered II, III, IV and V, for the reason they do not, nor does any one or more of them, contain a correct statement of the law applicable to the factual situation presented by the evidence.

III.

Defendants respectfully request that the Findings of Fact and Conclusions of Law to be entered by the Court, under the evidence and the law thereunto applicable, be as follows:

Findings of Fact

I.

On November 17, 1954, defendants Elmer F. Shepard and Kathryn M. Shepard entered into an option to purchase agreement with Ernest Otto and Henry Haas. The option to purchase concerned certain land located in the State of Arizona, County of Maricopa, more particularly described as follows, to wit:

> The North One-Half of Section 21, Township 1 North, Range 9 West, Gila and Salt River Base and Meridian.

II.

That said Otto and Haas had the opportunity to invesigate said property and the chattels thereon and did, in fact, investigate the same, and thereafter entered into the option agreement aforesaid.

III.

That said Otto and Haas entered into said option agreement by virtue of their own investigation of the aforesaid real property and not by reason of any representations made to them by the defendants Shepard, or either of them.

IV.

That the value of the aforesaid real property at the time the option agreement was entered into was in excess of the purchase price paid by the plaintiff, who is the assignee of said Otto and Haas, and plaintiff has not been damaged.

Conclusions of Law

I.

The Court does not have jurisdiction of the matter because plaintiff is not a proper party plaintiff.

Schwartz v. Durham,
52 Ariz. 256, 80 P. 2d 456.

II.

The Federal Court is bound to follow the controlling rules of substantive law, as declared by state legislatures or the highest state courts, in all cases based on diversity of citizenship jurisdiction, unless a Federal constitutional or statutory question is involved.

Erie Rr. Co. v. Tompkins,
58 Sup. Ct. 817, 304 U.S. 64, 82 Law Ed. 88.

New York Life Insurance Co. v. Rogers,
126 F. 2d 784 (CCA Ariz.).

III.

The measure of damages to be applied in this case is the difference between the real value of the property purchased and the value it was represented to be worth.

Lutfy v. R. D. Roper & Sons,
57 Ariz. 495, 115 P. 2d 161.

Wooley v. Locarnini,
18 Ariz. 539, 164 P. 319.

Curry v. Windsor,
22 Ariz. 108, 194 P. 958.

Ren v. Jones,
38 Ariz. 476, 1 P. 2d 110.

Hidalgo v. McCauley,
50 Ariz. 178, 70 P. 2d 443.

IV.

An action for fraud is a personal action, not assignable.

Schwartz v. Durham,
52 Ariz. 256, 80 P. 2d 456.

V.

A corporation not in existence at the time of an alleged fraud has no legal right to bring an action for fraud based upon negotiations between a seller and third parties.

Nearpark Realty Corp. v. City Investing Company, 112 N. Y. Supp. 2d 816.

Fox v. Hirschfield,
142 N. Y. Supp. 261.

Schwartz v. Durham, I.D.

VI.

Fraud is never presumed, but must be shown by clear and convincing evidence.

Cole v. Town of Miami,
53 Ariz. 234, 83 P. 2d 797.

VII.

Where one makes an independent investigation of real property before purchase and relies on his own investigation rather than representations made to him by the seller, he has no cause of action for fraud.

Carlson v. Brickman,
110 Cal. App. 2d 237, 242 P. 2d 94.

Law v. Sidney,
47 Ariz. 1, 53 P. 2d 64.

Respectfully submitted,

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY—THURSDAY,
JANUARY 10, 1957

Honorable Dave W. Ling, United States District Judge, Presiding.

It Is Ordered that Defendants' Objections to Plaintiff's Proposed Findings of Fact and Con-

clusions of Law are overruled, and that Plaintiff's Proposed Findings of Fact and Conclusions of Law are approved and adopted as the Findings of Fact and Conclusions of Law herein and that the Clerk enter judgment in accordance therewith.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED FINDINGS AND CONCLUSIONS

Findings of Fact

I.

Plaintiff is a corporation whose organization under the laws of California was completed on January 7, 1955. It was authorized to do business in Arizona on February 24, 1955. Each of defendants is a citizen and resident of Arizona. The amount in controversy in this action exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

II.

On or about November 17, 1954, defendant Elmer F. Shepard made certain representations to one Ernest Otto and one Henry Haas regarding the condition of a well on the land described in Finding III which was owned by Shepard. At the time these representations were made, it was contemplated by

Otto and Haas and certain other residents of California to form plaintiff corporation in order to purchase the land in question from defendant Shepard. These facts were known to Shepard.

III.

The representations referred to in Finding II were made on the land which Otto and Haas, on behalf of plaintiff, contemplated buying from Shepard. This land is located in the State of Arizona, and is more particularly described as:

> The North ½ of Sec. 21, Township 1 North, Range 9 West, Gila & Salt River Base & Meridian.

IV.

The specific representations made by Shepard at that time and place were as follows:

(a) That it was Shepard's opinion that the well on the land would pump twenty-two hundred gallons of water per minute.

(b) That the pump had been pulled from the well on only two occasions; once due to a mistake on the part of the pump company, and once for the purpose of deepening the well.

(c) That the well was in good condition.

(d) That the well would run seventy-five two-inch siphon tubes for the purpose of irrigation.

V.

Both Otto and Haas inquired as to the dirty character of the water pumped from the well, but were told by Shepard that it always cleared up within a couple of hours after the well was turned on. Shepard made no further reference to the history of the well in this conversation or in any other conversation with Otto and Haas or with any other representative of the plaintiff other than that indicated in Finding IV.

VI.

Otto inspected the pump and well at the time of this conversation, but was prevented from learning the true condition of the well by virtue of the fact that the spout of the well had an elbow in it and a baffle had been welded into the elbow. The combined effect of the baffle and elbow gave an appearance of a considerably more flow of water from the spout than was actually the case.

VII.

Otto was an experienced California cotton farmer, but had had no acquaintance with deep water wells of the kind used in Arizona.

VIII.

Otto's formal education had ended with the tenth grade. Haas had had no experience with cotton farming or with wells of any sort. Otto estimated the output of the well at the time of this conversation as approximately two thousand gallons per minute, but

in so doing he was influenced by the deceptive effect of the baffle in the elbow of the spout.

IX.

Each of the representations described in Finding IV were false in the following regard:

(a) The pump at the time the representation was made, and for several months previous thereto had been incapable of pumping more than fifteen hundred gallons per minute. Shepard was aware of this and did not believe the pump would put out twenty-two hundred gallons per minute.

(b) The pump had actually been pulled four times in less than two years, and Shepard had spent over Twelve Thousand Dollars ($12,000.00) in an effort to salvage what the man who drilled it described as a "bad well from the day it was drilled."

(c) The casing in the well was broken or collapsed at a point somewhere between four hundred feet and five hundred feet down.

(d) The well would not at the time of the conversation, nor for a period of several months before, run more than sixty two-inch tubes for the purpose of irrigation.

X.

Defendant Elmer Shepard knew that each of these representations were false.

XI.

Defendant Elmer Shepard intended that these

representations be acted upon by Otto and Haas, and by plaintiff which he knew at that time Otto and Haas contemplated forming.

XII.

Each of these representations was material to the transaction involved, since the presence or absence of water on the desert land in this area is the principal factor in fixing the value of the land.

XIII.

Neither Otto nor Haas, nor any other agent of the plaintiff at any time prior to the execution of the agreement described below knew of the falsity of these representations.

XIV.

Otto and Haas, in reliance on the truth of these representations, and in contemplation of forming a corporation to exercise the option, entered into an option agreement on November 17, 1954, with defendants Elmer and Kathryn Shepard whereby they obtained an option to purchase the land in question for the sum of Two Thousand Dollars ($2,000.00).

XV.

On January 11, 1955, plaintiff, with the consent of Otto and Haas and of the Shepards, contracted in writing with the Shepards to purchase the land together with certain personal property for the sum of Eighty Thousand Dollars ($80,000.00). Twenty

Thousand Dollars ($20,000.00), (including Two Thousand Dollars ($2,000.00) previously paid for the option) was paid then and the balance was to be paid over a period of years.

XVI.

Plaintiff, by its agent, Otto, went into possession of the land in March, 1955, and immediately commenced irrigating in preparation for a cotton crop. When first turned on, the pump in the well in question produced less than fifteen hundred gallons of water per minute, and thereafter its output constantly declined throughout the summer so that by September, 1955, it produced only two hundred and fifty gallons per minute. Otto, on behalf of plaintiff, sought and followed the advice of an expert well driller as to how best to conserve the well. In October, 1955, it was necessary to completely replace the well and drill a new one. Plaintiff expended the sum of Twenty-two Thousand Six Hundred Six and 40/100 Dollars ($22,606.40) in drilling and equipping a new well. The expenditure of this sum was reasonably necessary to produce a well approximately equivalent in cost and production to that represented by Shepard as being on the property at the time of sale.

XVII.

Plaintiff's cotton crop was damaged by the lack of water directly resulting from the failure of the well. Plaintiff, by its agent, Otto, made reasonable efforts to get water elsewhere but was unsuccessful in so doing. The difference in the value at maturity

of the crop which would have resulted had the water supply been as represented, and that which actually did result, was Twelve Thousand Five Hundred Dollars ($12,500.00).

XVIII.

Plaintiff has brought this action in its own right and as assignee of the rights of Otto and Haas.

Conclusions of Law

1. This Court has jurisdiction of the parties by reason of diversity of citizenship. 28 O.S.C. 1332.

2. By reason of the fraudulent misrepresentation of defendant Elmer Shepard defendants are liable to plaintiff for the damages sustained by plaintiff which were proximately caused by said representations.

3. Under Arizona law, the measure of damages for fraudulent misrepresentation is the so-called "benefit of the bargain" rule, or the difference between the value as represented and the actual value. Lutfy v. R. D. Roper & Sons, 57 Ariz. 495, 115 P. 2d 161. In the situation of this case, a recognized alternative measure proceeding on the same theory is the reasonable cost of placing the property received in the condition in which it was represented to be. McCormick on Damages, Section 122, p. 154.

4. These damages amount to Thirty-five Thousand One Hundred Six and 40/100 Dollars ($35,106.40).

5. Plaintiff is entitled to judgment against defendants in the amount of Thirty-five Thousand One Hundred Six and 40/100 Dollars ($35,106.40).

RAGAN & REHNQUIST,

By /s/ WILLIAM H. REHNQUIST,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

Proposed Findings, etc., endorsed, filed November 29, 1956.

[Endorsed]: Findings and Conclusions filed January 10, 1957.

[Title of District Court and Cause.]

DOCKET ENTRY

Jan. 10—Enter judgment in favor of the plaintiff, Cal-Nine Farms, a corporation, and against the defendants, Elmer F. Shepard and Kathryn M. Shepard, his wife, in the sum of $35,106.40.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come Now the defendants, and each of them, and move the Court for an order vacating and setting aside the judgment of the Court in the above-entitled matter, which judgment was against the de-

fendants and in favor of the plaintiff, and was rendered on the 23rd day of November, 1956, and for an order granting judgment for the defendants, or in the alternative, for an order granting a new trial in said matter.

Said motion is made upon the following grounds:

1. For errors of law occurring at the trial and during the progress of the cause;

2. That the judgment is not justified or supported by the evidence;

3. That the judgment is contrary to law;

4. That the Court erred in admitting evidence offered by the plaintiff;

5. That the Court erred in rejecting evidence offered by the defendants;

6. That the Court erred in rendering judgment against the defendants and in favor of the plaintiff;

7. That the Court erred in overruling and denying these defendants' objections to jurisdiction;

8. That the Court erred in failing to apply the proper measure of damages; and

9. That there is no sufficient or substantial evidence tending to support the amount of the judgment.

Dated at Phoenix, Arizona, this .... day of January, 1957.

KRAMER, ROCHE & PERRY,
Attorneys for Defendants.

Memorandum of Points and Authorities

1. Federal Rules of Civil Procedure, Rule 59, authorizes the Court to grant a new trial, or, in the alternative, to correct the judgment and direct the entry of the new judgment.

2. In support of Motions 1, 3, 4, 5, 6, 7 and 8, the defendants cite to the Court the following propositions of law and cases supporting the same:

(a) An action for fraud is a personal action, not assignable.

Schwartz v. Durham,
52 Ariz. 256, 80 P. 2d 456.

(b) A corporation not in existence at the time of an alleged fraud has no legal right to bring an action for fraud based upon negotiations between a seller and third parties.

Nearpark Realty Corporation v. City Investing Company, 112 N. Y. S. 2d 816.

Fox v. Hirschfield,
142 N. Y. S. 261.

Schwartz v. Durham, id.

Houston v. Ohio & Colorado S & R Co.,
63 Colo. 152, 165 P. 251.

(c) Fraud is never presumed, but must be shown by clear and convincing evidence.

Cole v. Town of Miami,
53 Ariz. 234, 83 P. 2d 797.

Wood v. Ford,
50 Ariz. 536, 72 P. 2d 423 (Elements of Fraud).

(d) Where one makes an independent investigation of real property before purchase and relies on his own investigation rather than representations made to him by the seller, he has no cause of action for fraud.

Carlson v. Brickman,
110 Cal. App. 2d, 237, 242 P. 2d 94.

Law v. Sidney,
47 Ariz. 1, 53 P. 2d 64.

(e) The measure of damages sustained by the purchaser where a purchase has been induced by fraud is the difference between the real value of the property purchased and the value which it would have had, had the representations been true.

Lutfy v. R. D. Roper & Sons,
57 Ariz. 495, 115 P. 2d 161.

Wooley v. Locarnini,
18 Ariz. 539, 164 P. 319.

Curry v. Windsor,
22 Ariz. 108, 194 P. 958.

Ren v. Jones,
38 Ariz. 476, 1 P. 2d 110.

Hidalgo v. McCauley,
50 Ariz. 178, 70 P. 2d 443.

In connection with the above authorities, it is pointed out to the Court that in the case of Wooley v. Locarnini, cited above, the jury found that the land sold was in fact worth more at the time of sale than the purchaser had paid for it, and took this fact into consideration in determining damages, and reduced the damages because of said finding. That is precisely the position defendants have maintained in regard to alleged damages in this case. There was testimony by Shepard that the land was worth at the time of sale, at least the purchase price, and possibly more. Therefore, plaintiff could not be damaged.

The case of Ren v. Jones, cited above, stands for the proposition that repairs made to property as much as a year after purchase are not material and have no bearing on the measure of damages. This point goes directly to the judgment of the Court granting $22,606.40 for the cost of a new well, which defendants contend is error, since it constitutes awarding damages on the basis of cost of repair.

Defendants feel the Court erred therefore in the determination of damages and in refusing to allow cross-examination of the witness, Cameron, in regard to the value of the property at the time of sale. Defendants also maintain that the Court erred in taking evidence on the part of plaintiff as to the cost of drilling a new well, as this did not constitute the measure of damages under the Arizona cases.

(f) The Federal Court is bound to follow the controlling rules of substantive law, as declared by

State Legislatures or the highest State Courts, in all cases based on diversity of citizenship jurisdiction, unless a Federal, constitutional or statutory question is involved.

Erie R. Co. v. Tompkins,
58 Sup. Ct. 817, 304 U. S. 64, 82 L. Ed. 88.

New York Life Ins. Co. v. Rogers,
126 F. 2d 784 (C.C.A., Ariz.).

Defendants contend that under the Erie v. Tompkins rule above, the Court is bound to follow the Arizona rule on measure of damages, fraud, parties plaintiff, and sufficiency of evidence. It is submitted, the Court did not follow these rules as set out by the Arizona Supreme Court and that failure to do so was reversible error which entitles defendants to a judgment in their favor, or a new trial.

Defendants wish to point out to the Court that under the Arizona rule for measure of damages, as cited above, the action of the Court in awarding a money judgment is error under the cases cited in paragraph (e) above, since plaintiff still owes money to defendants for the purchase of the property in question.

3. In support of Motions 2 and 9 defendants cite the following propositions of law and supporting cases:

(a) Plaintiff must prove all the elements of actionable fraud, to wit:

1. A representation;
2. Its falsity;
3. Its materiality;
4. The speaker's knowledge of its falsity or ignorance of its truth;
5. His intent that it should be acted upon in the manner reasonably contemplated;
6. The hearer's ignorance of its falsity;
7. His reliance upon its truth;
8. His right to rely thereon; and
9. His consequent and proximate injury.

Stewart v. Phoenix National Bank,
64 P. 2d 101, 49 Ariz. 34.

Sims Printing Company v. Kirby,
106 P. 2d 197, 56 Ariz. 130.

Wilson v. Byrd,
79 Ariz. 302, 288 P. 2d 1079 (Re: Right to rely).

Beville v. Allen,
237 P. 184, 28 Ariz. 397 (Re: Growing crops).

(b) Where it fairly appears from evidence that a buyer undertook to investigate for himself matters as to which representations had been made, he cannot later claim that he acted upon the representations.

The following cases hold that in fraud cases, the purchaser who has undertaken to make an inspection is not limited to doing the things he may find

to be convenient. If he neglects to discover conditions before him from failing to examine what was available for examination, he cannot deny knowledge of defects which existed. These cases also hold that where the buyer is aware of suspicious circumstances or has learned of the falsity of one or more representations, he is under a legal duty to make a complete investigation and may not rely upon statements of the seller.

Carpenter v. Hamilton,
18 Cal. App. 2d 69, 62 P. 2d 1397, 1401.

Gratz v. Schuler, supra,
12 Cal. Jur. Sec. 37, p. 763.

Gifford v. Roberts (Cal. App.),
184 P. 2d 942, 945.

Podlasky v. Price (Cal. App.),
196 P. 2d 608, 614.

Cameron v. Cameron (Cal. App.),
199 P. 2d 443, 447.

Defendants also refer the Court to paragraphs 2(c), 2(d) and 2(e), hereinabove referred to, as additional authority.

Respectfully submitted,

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,
Attorneys for Defendants.

[Title of District Court and Cause.]

NOTICE OF HEARING MOTION FOR NEW TRIAL

To: Cal-Nine Farms, a corporation, plaintiff, and to Ragan & Rehnquist, its attorneys:

You, and Each of You, Will Please Take Notice that the undersigned will call up the Motion for a New Trial, heretofore filed in the above-numbered and captioned cause, on Monday, the 28th day of January, 1957, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, in the Courtroom of the above-entitled Court, at which time and place you may appear and take such part as you deem fit.

Dated at Phoenix, Arizona, this 14th day of January, 1957.

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

MINUTE ENTRY—FRIDAY, MARCH 1, 1957

Honorable Dave W. Ling, United States District Judge, Presiding.

It Is Ordered that Defendants' Motion for New Trial is denied.

(Docketed March 1, 1957.)

[Title of District Court and Cause.]

DEFENDANTS' NOTICE OF APPEAL

Notice Is Hereby Given that the defendants above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment of the United States District Court for the District of Arizona, rendered and entered on the 10th day of January, 1957, in the above-entitled cause, and from the whole of said judgment and from the order of said District Court entered March 1, 1957, denying the defendants' motion for a new trial.

KRAMER, ROCHE & PERRY,

By /s/ F. HAZE BURCH,

Attorneys for Defendants.

[Endorsed]: Filed March 22, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE IN APPELLATE COURT

Upon motion of Defendants-Appellants, good cause appearing therefor,

It Is Ordered that the time within which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 20th day of June, 1957.

Dated this 15th day of April, 1957.

/s/ DAVE W. LING,
District Judge.

[Endorsed]: Filed April 15, 1957.

In the District Court of the United States
for the District of Arizona

Civ. 2343—Phx.

CAL-NINE FARMS,

Plaintiff,

vs.

ELMER F. SHEPARD and KATHRYN M. SHEPARD, His Wife,

Defendants.

DEPOSITION OF ELMER F. SHEPARD

Be It Remembered that the deposition of Elmer F. Shepard, a defendant herein, was taken pursuant

to stipulation before H. R. Larson, a Notary Public in and for the County of Maricopa, State of Arizona, on the 2nd day of February, 1956, commencing at the hour of 3:30 o'clock p.m., at the offices of Messrs. Kramer, Roche & Perry, First National Bank Building, Phoenix, Arizona.

The plaintiff was represented by its attorneys, Messrs. Ragan & Rehnquist, and the defendants were represented by their attorneys, Messrs. Kramer, Roche & Perry, by Mr. Frank Haze [1*] Burch.

The following proceedings were had:

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled action, through their respective attorneys, that the deposition of Elmer F. Shepard, a defendant herein, may be taken upon cross-examination as an adverse party by the plaintiff before H. R. Larson, a Notary Public in and for the County of Maricopa, State of Arizona, at the time and place heretofore noted.

It Is Further Stipulated that all objections except as to the form of the questions propounded are reserved until the time of trial.

It Is Further Stipulated that the witness may read and sign the deposition at the end thereof, and that the requirements of the statutes relating to return of and notice of filing of said deposition are waived.

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*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ELMER F. SHEPARD

being first duly sworn by the Notary, testified as follows: [2]

Cross-Examination

By Mr. Rehnquist:

Q. State your name, please.

A. Elmer Francis Shepard.

Q. You are one of the defendants in this action?

A. Yes.

Q. The husband of Kathryn M. Shepard?

A. Yes; that is right.

Q. Where do you live? A. Liberty.

Q. Is that near Buckeye?

A. About three miles east.

Q. How long have you lived there?

A. In this particular house or in that area?

Q. In that area. A. 37 years.

Q. Did you, immediately prior to January, 1955, own a parcel of land in the Harqua Hala Valley designated as the north half of Section 21, Township 1 North, Range 9 East? A. No; 9 west.

Q. I am sorry, 9 west. And that is the land that has been discussed and described in the examination of Mr. Otto? [3] A. That is right.

Q. When did you purchase this land?

A. I am not sure. I believe in 1952.

Q. Did it have a well on it then?

A. No; it was raw desert.

Q. You purchased it as raw land?

A. Yes.

Q. Did you put a well in? A. I did.

(Deposition of Elmer F. Shepard.)

Q. Did you farm it?

A. Which well are you speaking of, the one that collapsed?

Q. Did you farm the land? A. Yes.

Q. How many years did you farm it?

A. Well, let's see, before Mr. Otto bought it?

Q. Yes. A. Two years.

Q. Two years. That would have been 1953 and 1954? A. Yes.

Q. Have you owned other land in the Buckeye area? A. Yes.

Q. Have you farmed any other land in the [4] Buckeye area? A. Yes.

Q. Over how long a period of time?

A. Oh, probably 13 or 14 years.

Q. Have you sold within the past, say, ten years any land other than the land here in question in the Buckeye area? A. No; I don't believe so.

Q. Have you bought any other land out there within the last ten years?

A. Out in Harqua Hala?

Q. In Harqua Hala or the Buckeye area?

A. Yes; I have bought other ground.

Q. Would you describe the land in the Harqua Hala Valley as desert land? A. Yes.

Q. Some water supply is necessary to successfully farm it? A. That is right.

Q. Calling your attention to the year 1954, what would you say the price of raw desert land in the Harqua Hala Valley was in that year?

A. In 1954, well, I sold some for $50 an acre.

(Deposition of Elmer F. Shepard.)

Q. Did you regard that as a fair price?

A. I thought it was. [5]

Q. What is the price of such land today?

A. Of raw ground?

Q. Yes.

A. I paid $125 an acre for some raw land there. It depends on the area. Anywhere from $20 I would say to $125.

Q. Again calling your attention back to the year 1954, what was the price per acre of the land in the Harqua Hala Valley which had a proven well on it?

A. In 1954, it depended on the ranch and different factors, improvements.

Q. What would the range of prices be?

A. Oh, I would say anywhere from $250 to $450.

Q. Per acre, that is?

A. Yes; right in that immediate area.

Q. And, if because of a fault underground, or some other geological formation, it was known no successful well could be put down on the land, what would that kind of land sell for, if you know?

A. Well, I don't know.

Q. Do you think such land would be worth much?

Mr. Burch: We will object to that—oh, go ahead and answer if you know. [6]

A. I don't know, that is beyond me.

Q. (By Mr. Rehnquist): Would you say the availability of water on this land is a pretty vital factor in its price? A. I don't know.

(Deposition of Elmer F. Shepard.)

Q. You don't know whether water is important in pricing that land?

A. Well, yes; it has a bearing on the value of the ground, I imagine, several factors. It would be the improvements on the property, and the type of ground, whether it was the type of soil that——

Q. Would you say water was an important factor? A. Oh, yes.

Q. Do you remember what you paid for the land that you later sold to Mr. Otto?

A. Very well. I was one of the first in that area. I bought it in an unimproved district for $20 an acre.

Q. Did you place any improvements on the land?

A. Yes.

Q. You said you did drill the well on it?

A. Yes.

Q. Was your first well a success? [7]

A. No; the casing was ripped and it was—with the cable tool and it collapsed.

Q. Did you drill another well? A. Yes.

Q. That was the well that you showed to Mr. Otto when he came out to see about purchasing your land? A. That is the one Mr. Otto saw.

Q. When was that well drilled, if you remember? A. I don't remember.

Q. Do you remember the year in which it was drilled?

A. I believe it was in 1953. I couldn't be sure.

Q. Do you remember how long after you bought the property it was drilled?

(Deposition of Elmer F. Shepard.)

A. No; I don't. I would have to look it up.

Q. Who drilled your second well for you?

A. Gordon Cameron.

Q. Is he a good friend of yours?

A. A very good friend.

Q. Do you know what depth he went to on that second well?

A. The first depth was 1,033, cased.

Q. Do you know the gallonage that this well put out immediately after it was drilled? [8]

A. No; that would be hard to estimate.

Q. What did you do by way of maintenance and upkeep on this well?

A. What do you mean, on the equipment or the well?

Q. First, let us take the equipment.

A. Well, the engine and the equipment was checked every two weeks during the pumping season by State Tractor, and kept in good repair at all times, points, plugs, anything it happened to need.

Q. That continued up to the time you sold the land to Mr. Otto?

A. That is right. I have statements to show.

Q. You have statements covering that service?

A. Yes.

Q. Did you pack the well with gravel?

A. Yes.

Q. How often?

A. Well, I don't think you understand a gravel

(Deposition of Elmer F. Shepard.)

packed well. Whenever it is drilled, it is gravel packed, and a gravel chute is put in the well bed, that is, concrete around the casing, and if the well should displace the material below, then it takes more gravel, it takes gravel, and you put it in the gravel chute. [9]

Q. So there is no regular period in which you pack a well? A. No.

Q. Have you any idea how often it would run in your well?

A. I don't know. I put two loads. I don't know how many tons that would be, that I put in the well, and it was apparently filled because it didn't take any more.

Q. And did you at the time of the sale to Mr. Otto believe that the well was sufficiently packed with gravel? A. That is right.

Q. Why did you believe that?

A. Because it wouldn't take any more, and I don't think he was able to put any more in it.

Q. Do you regard yourself as having adequately maintained the well both as to gravel pack and machinery?

A. I did everything possible to keep it in running order.

Q. Did you ever have any trouble with your well after it was put in?

A. What kind of trouble do you mean? With the equipment or the well?

Q. First, let's take the well. Let's take [10] the hole.

(Deposition of Elmer F. Shepard.)

A. Well, as everybody knows in that area there was some silt. Gordon has a well that throws some silt. There is wells all over the state that does that. So he thought maybe by increasing the capacity, and getting it away from that, I could deepen the well, so I deepened it to 1,375 feet.

Q. Do you remember when that was approximately?

A. Well, it was about a year before Mr. Otto bought the place.

Q. That would be then right around the beginning of 1954?

A. Yes; it was before that bedding season, the cotton crop.

Q. And who deepened it for you at that time?

A. Gordon Cameron.

Q. Did you know the gallonage output of the well before he deepened it? A. No.

Q. What did Gordon Cameron do to the well?

A. Like I say, he deepened it to 1,375 feet. He couldn't get his mud to circulate. There seemed to be such a tremendous amount of water underground he couldn't get circulation on the [11] mud, so he wet drilled it, water drilled it, 1,375 feet.

Q. Did he report any difficulty in getting it down, to you?

A. There was some slight something or other that held the bit for a little while; he said it could have been an egg-shape in the casing when it was unloaded from the truck. That was his report to me, and he went from that size bit to one under

(Deposition of Elmer F. Shepard.)

that size, and it went down perfectly without any trouble whatsoever.

Q. Do you remember the size bit involved?

A. He tried a 15, I think. I think he went to a 12 and three-quarters. I wouldn't state that as a fact. I gave him the job; he was to do the job and he did it. I did not care what size bit he put in it.

Q. He didn't report this to you as a serious obstruction? A. No; nothing serious.

Q. Did he tell you what depth that was?

A. Well, I did know about. I don't remember.

Q. Was this the only time you had any trouble with the well, as opposed to the machinery?

A. The only trouble I had with the well. You couldn't classify that as trouble. He could. [12] have put a 9-inch bit in there as far as I was concerned. I just wanted the well deepened.

Q. There was no other occasion during the time between when you had the well drilled and the time you sold the land, that you had Gordon Cameron or any other well driller back?

A. No. The equipment was put back in. The crop was grown on the land, and a minute ago when he mentioned that I used water from Gordon, it was ten days' time, and they thought it was in the pump, and they pulled the pump, and it wasn't the pump, and they found it was the gas pressure on the engine, and it took about two turns with a screwdriver to put it back in shape.

Q. That was a different time than this deepening? A. Yes.

(Deposition of Elmer F. Shepard.)

Q. When was that, do you remember?

A. That was along in either July or August, I don't remember which.

Q. And you pulled the pump at that time?

A. Yes.

Q. And what again was the trouble?

A. The trouble was in the gas pressure on the engine. It was their mistake, but I paid for it. [13]

Q. Who pulled the pump for you?

A. The State Tractor.

Q. It was during that time you used Gordon's water?

A. Yes; one of the times. One other time when we had some trouble—no; that was the time.

Q. So those were the only two times you had anything that might be called trouble either with the well or with the machinery?

A. Well, other than something minor with the engine. There was one time—or the pump. There was one time that the—I will show you on this diagram. This nut right here——

Mr. Rehnquist: I think we might do better to identify this, Mr. Shepard. Would you like to make reference to this in your explanation?

A. Yes.

Mr. Rehnquist: If so, may we call this Exhibit A?

(The document referred to was marked Plaintiff's Exhibit A by the Notary.)

Q. (By Mr. Rehnquist): Would you continue with your description?

(Deposition of Elmer F. Shepard.)

A. This particular nut right here, I guess it would be the shaft tube tension nut.

Q. As shown on the exhibit? [14]

A. As shown right here, vibrates or something, causing it to slip, and it was replaced, which takes time during a busy season. If they are on some other job, it takes a few days for them to get to it.

Q. Did your well have an elbow spout on at the time you sold it to Mr. Otto?

A. A bonnet down turn. It is an elbow, I guess you would call it. We call it a bonnet.

Q. And was that put on at the time the well was drilled?

A. It was put on at the time I believe when it was—I couldn't say, either, when it was drilled or when it was deepened.

Q. It could have been put on when it was deepened, is that correct?

A. Yes; which was the year before Mr. Otto bought it.

Q. Did you have welded inside the spout some sort of a flange?

A. Did I have welded? Did I cause to have it welded?

Q. Did you cause to have welded? A. No.

Q. Was there such a flange inside?

A. Yes. [15]

Q. How did it get there?

A. The man that put the bonnet on it put it in.

Q. Who was the man that put the bonnet on?

A. Ernest Woods.

(Deposition of Elmer F. Shepard.)

Q. Ernest Woods? A. Yes.

Q. Is he referred to as Woody?

A. Yes; I think so.

Q. When was that, do you know, at the same time the bonnet?

A. I think when the bonnet was put on it.

Q. What was the purpose of that flange?

A. To hold back pressure, a certain amount of back pressure on the cooling system, water exchanger.

Q. Is that a common practice in that kind of well?

A. Well, there is different ways. That was their method, his method.

Q. You didn't suggest it to him?

A. I never suggested it; no.

Q. To your knowledge has that been done on other wells in Harqua Hala Valley?

A. Well, there is a butterfly in most of those wells to force the water in an overhead pipe. [16] They have the 10-inch, like on Gordon's. I don't know what that is on there for unless for that reason, and then over on the Stall place they have a pipe that goes up, causes back pressure on the cooling system.

Q. Does that flange give the impression of more water coming out of the spout than would be given if there weren't any flange in it?

A. I don't know. I wouldn't know.

Q. You knew that the flange was put on at the time it was put on?

(Deposition of Elmer F. Shepard.)

A. No; at the time it was put on, no.

Q. When did you discover it?

A. Oh, some time later. I noticed they had put in the thing. I didn't pay any attention to it. I had a man running the pump for me, taking care of it, and whatever method he saw fit to use, to perform any certain part of the operation, was all right with me.

Q. How did this flange first come to your attention?

A. Well, I think he mentioned one day he put it in there. He didn't have to use quite as much pressure on his butterfly.

Q. Do you recall when that was that he mentioned it to you? [17] A. No.

Q. You knew that it was there at the time you were talking to Mr. Otto about the sale?

A. Oh, yes; it was there 60 days after we bought the place. I made no attempt to take it out.

Q. You knew it was there at the time you were talking to Mr. Otto? A. Oh, yes.

Q. Did you raise cotton on this land?

A. Yes.

Q. In '53? A. Yes.

Q. And in '54? A. Yes.

Q. Is there any ratio of gallons per minute to acres of cotton that is considered necessary for a cotton crop?

A. No; I think that is mostly up to the individual.

(Deposition of Elmer F. Shepard.)

Q. Is there any minimum below which you couldn't go?

A. Well, I wouldn't say. I just don't know about things like that. The rainfall, you would have to consider the rainfall, and the type of ground. A lot of people get by and grow quite a few acres on an 8-inch well. [18]

Q. On this particular land, would you make any estimate?

A. Well the same well that he was using, I finished 211 acres of cotton with it the year before.

Q. That was 1954? A. Yes; '54.

Q. How many bales per acre did you get that year, Mr. Shepard?

A. I couldn't say exactly, but I think it was close to 2 bales.

Q. Where did you have that ginned?

A. The Acme Gin. I would have to check that. I couldn't say definitely, make a definite statement.

Q. You are sure it was ginned at the Acme Gin?

A. I am sure of that, but I mean the number of bales.

Q. Do you remember how many bales per acre you got in '53?

A. No; not exactly. I think it averaged around three-quarters of a bale the first year.

Q. Three-quarters of a bale the first year?

A. Yes.

Q. Did you have any trouble with insects [19] your first year? A. No more than normal.

(Deposition of Elmer F. Shepard.)

Q. Any trouble with root rot or any other disease?

A. Root rot, what do you mean by "root rot"?

Q. Well, being a city boy, maybe I am off on the wrong track. Is there a disease called root rot?

A. We didn't have it out there. They may have it in Texas, but not out there.

Q. Did you have any sort of disease of the plants? A. No.

Q. You are acquainted with Mr. Otto here?

A. Yes.

Q. And was he a party to an option agreement concerning your parcel of land? A. He was.

Q. When did you first meet him?

A. Well, I don't know; I don't remember.

Q. Was it in 1954? A. I believe it was.

Q. What was the occasion on which you first met him, do you remember that?

A. I think I was moving some cattle, doing [20] something on horseback, and he was picking cotton; the machine was going on the neighbor's place.

Q. It was during the cotton picking season?

A. Yes; during stub season; not the planted. The planted had not started the harvest yet. It was still being watered. I was still running water on my place when I met Mr. Otto picking stub on the neighbor's.

Q. Did you have any conversation at that time about buying or selling land in the Harqua Hala Valley?

(Deposition of Elmer F. Shepard.)

A. I believe that is the time he mentioned to me he wanted to buy a place in that country.

Q. Did you offer to sell him your land then?

A. No, sir.

Q. Did you tell him you were interested in selling?

A. No; I believe—I don't know whether that was the time, or some time later; he asked me if I would sell it and what I wanted for it, and I told him what I had had it priced at; that I was undecided whether to sell it or not.

Q. What did you tell him you had it priced at?

A. $250. [21]

Q. That would make a total of $80,000?

A. $80,000.

Q. Did he later come to see you about purchasing this land?

A. Yes; quite some time later.

Q. Would that have been in November, 1954?

A. You have got me on those dates because I can't remember.

Q. Would it have been in the fall of 1954?

A. I believe it was.

Q. Was he accompanied by anyone at that time?

A. When he approached me on the sale of it?

Q. Yes.

A. At that particular time I think Mr. Haas was with him.

Q. And was this at your ranch that this meeting took place?

A. Well, now, I have heard that a minute ago.

(Deposition of Elmer F. Shepard.)

I don't remember whether it was at the ranch or inside.

Q. When you say inside, what do you mean?

A. Home, at Buckeye.

Q. It could have been on the place, as you remember it?

A. It could have been on the place.

Q. Was anyone with you at the time of this [22] conversation?

A. That is something else I can't remember because I attached no significance to it. There was hardly any discussion on it whatsoever. The man that worked for me could have been there. I don't remember.

Q. You don't remember him being there, being definitely present while you were talking?

A. No; not at that particular time.

Q. Did you know at that time Mr. Otto was from California? A. Yes.

Q. Did you know Mr. Haas was from California? A. Yes.

Q. And at this time they told you they were interested in buying the land?

A. I presume that is what he was over here for, to buy it.

Q. Did they actually tell you they were interested in buying it? A. Yes.

Q. Did you discuss the price? A. Yes.

Q. And did you again quote to them $250 an acre?

(Deposition of Elmer F. Shepard.)

A. Well, I don't know whether I did at that [23] time or not.

Q. Did either Mr. Otto or Mr. Haas make any inquiry about the well on the land?

A. Yes. There was something said about it; asked me what production—what the well would produce, and I did, I told them that Jules Turner estimated it maybe would throw 2,400 gallons. I did not think it was that heavy. I did not know but what it would be nearer 2,200 gallons; that it was strictly an estimate. I told him I could be more of a judge—the well had never been measured—I could be more of a judge of the tubes it would run, and it would run 70 tubes.

Q. You told him the well would run 70 tubes?

A. That is right, and it would run 70 tubes slow, very slow, or 55 with a pretty good head of water. It depended on——

Q. Is there a correspondence on the number of tubes a well will run and its gallonage?

A. You can make the tubes run any amount you want to.

Q. Suppose the tubes are running slowly—supposing you assume you have 55 tubes running slowly, would that suggest to you a certain gallon output of that well?

A. No; not necessarily. You can take—it [24] depends on the pressure, the way you place them in the ditch, and the height of the ditch bank, and several different things.

Q. If you made all those factors uniform so that

(Deposition of Elmer F. Shepard.)

you knew exactly what you are talking about as to the position of the tubes and speed of the water, it would correspond to some gallon output, wouldn't it?

A. Well, I wouldn't say. I don't know.

Q. When you told Mr. Otto it ran 70 tubes, that didn't suggest to you any gallon output from the well?

A. Not necessarily. I was leaving it up to him to judge because I had never had the well measured, and it was beyond me, what it would throw, and he could—if he could judge by the number of tubes, I was willing for him to judge it that way.

Q. You never measured the gallon output of the well?

A. No; it has never been measured.

Q. At any time that you have had it?

A. No, sir.

Q. How would you go about measuring it if you wanted to?

A. I would not know how to measure it without [25] a weir box.

Q. You could do it with a weir box?

A. You would have to have a weir box. I wouldn't know exactly how to do that. It would take somebody acquainted with that sort of thing to measure it.

Q. You wouldn't know how to do it even with a weir box? A. No.

Q. And it wasn't a common practice in the valley to actually measure the gallon output?

(Deposition of Elmer F. Shepard.)

A. I don't think there has been a well out there officially measured?

Q. It is all based on estimation?

A. That is more or less——

Q. And one of the bases for an estimate is the number of siphon tubes it will fill?

A. That may be one way; some people judge it that way.

Q. You say you judged the well to be putting out 2,200 gallons? A. Approximately.

Q. How did you form that judgment?

A. Probably the same way that he come to the conclusion it was throwing 2,000. It was my judgment. [26]

Q. What was it based on?

A. Well, the water in the ditch, running water in the ditch.

Q. Not the number of siphon tubes?

A. That could have a bearing on it.

Q. Did it have a bearing on it?

A. Well, I wouldn't know. I imagine it would to a certain extent. The number of siphon tubes would indicate whether—to some extent what kind of well you had. If you had one running 120 tubes you could figure pretty well it was throwing better than 2,000 gallons, way better. It could throw possibly better than 3,000.

Q. If 120 tubes meant better than 3,000, 70 tubes would mean some sort of gallonage?

A. Well, yes.

Q. What gallonage would that mean?

(Deposition of Elmer F. Shepard.)

Mr. Burch: If you can arrive at an estimate.

A. The 70 tubes, well, I couldn't say.

Q. (By Mr. Rehnquist): You could say 120 tubes would mean more than 3,000, but you won't say anything about 70 tubes, is that right?

A. I would say probably 70 tubes would throw better than 2,000, to get right down to it. I don't know, I am not a water expert.

Q. I show you a copy of a document, option [27] to purchase, marked Exhibit A in your answer. Did you sign that agreement? That is just the copy there, it wouldn't show your signature, but did you sign an agreement like this, of which that is a copy?

A. I would have to read it completely to tell.

Q. Well, now, Mr. Shepard, you in your answer said that you signed an agreement like that; you have attached it to your answer.

A. I have signed an agreement. Yes, I believe this is it.

Q. And did you sign it on the date that is indicated there, or somewhere around that date, the 17th day of November, 1954?

A. Yes, I believe so.

Q. Did you know on or around that date the approximate capacity of the well on your property?

A. On this particular date here?

Q. On or around there?

A. I suppose it was the same as when I finished the irrigation along in September.

Q. The question was, did you know at or around that date the approximate capacity?

(Deposition of Elmer F. Shepard.)

A. Approximate, I imagine so.

Q. And what was that capacity? [28]

A. Approximately probably 2,000 gallons or better.

Q. Can you say definitely it was 2,200?

A. No, I cannot say it was definitely 2,200 because the well was never measured.

Q. What would be your best estimate as to its capacity at that time?

Mr. Burch: If you know what it was at that time.

A. Well, I don't know.

Q. (By Mr. Rehnquist): In other words, you did not know the capacity of the well?

A. Not definitely, no.

Q. The question was "approximately."

A. Probably 2,200 gallons.

Q. Did you know on or around that date whether or not the gallonage pumped by the well was remaining constant?

A. Not at this date. The well wasn't running at this date. The well was cut down in September. When the well was cut off it was pumping the same as it had when the well was started, when it was deepened one year before.

Q. At that time when the well was cut off you had no reason to think the gallonage was decreasing? [29]

A. No reason, I couldn't see any reason why it would.

Q. And there was nothing that came to your at-

(Deposition of Elmer F. Shepard.)

tention between the time the well was cut off and the time of these conversations with Mr. Otto and Mr. Haas that would lead you to believe that the gallonage was decreasing? A. No.

Q. Did you regard the well to be in good condition at that time? A. Yes.

Q. Did you tell Mr. Otto and Mr. Haas that the well was in good condition?

A. No, that was never brought up.

Q. The only thing that was brought up was the estimate as to the gallonage output?

A. That is right.

Q. Did you believe it to be in good condition at this time? A. Yes, I did.

Q. After the execution of the option agreement on or about November 17th, did you have any further conversation with Mr. Otto or Mr. Haas regarding the land or the well? A. After——

Q. Say between that time and the escrow [30] instructions. A. Concerning the well?

Q. Concerning the well.

A. Between this time and the escrow instructions, no.

Q. Concerning the land in general, wasn't there some reference to—or a discussion of the cotton acreage allotment?

A. Oh, yes, it was not discussed; he was trying to get me to let some of my cotton land from the place inside, to go with it, but I refused.

Q. You have another place at Buckeye?

A. Yes.

(Deposition of Elmer F. Shepard.)

Q. Does your father have any land there?

A. Yes.

Q. Is that in the Harqua Hala Valley?

A. He has some in Harqua Hala and some at Buckeye.

Q. Did you know at the time you were negotiating the option agreement that Mr. Otto and Mr. Haas had incorporated or were going to incorporate if they decided to buy the land?

A. At the time of the option?

Q. Yes.

A. Well, Mr. Otto was—no, not at that [31] time. When they signed I knew it then, but not when we were talking the first time.

Q. But when the option agreement was signed you knew it?

A. Yes, Haas—it was rumored he was to have an interest in it.

Q. You had no objection to the corporation taking up the option given to Otto and Haas as the terms were complied with?

A. No, I don't see why I should.

Q. And you did not have? A. No.

Q. Was there any discussion at the time of signing the escrow instructions in January regarding the condition of the well, or presence of water on the land? A. No.

Q. Was there any discussion at that time at all about the land or the well?

A. I don't remember now except that when it went into escrow they were still trying to get some

(Deposition of Elmer F. Shepard.)

of the cotton base from inside. I did let them have almost 11 acres of hardship cotton that my place inside wouldn't receive, that I let go with that place. I would have lost it, and they could gain it. [32]

Q. Then all during the time on negotiations leading up to the sale there were no discussions as to the condition of the well other than what you have told me about?

A. Not that I can remember.

Q. Would you say your asking price for the land, that is, $250 an acre, was set on the basis of a well in good condition?

A. $250, set on a well that was in good condition? Ground sells at most any price. It could have been the type of ground, and the levelness of the place, several factors involve and influence the price per acre.

Q. Do you think if the well had been known to be caved in and a new well would have to be drilled, you could have gotten $250 an acre for the land?

A. If it had been known?

Q. Right. A. Well, I don't know.

Q. Don't you think there is some probability you might not have been able to get $250 for the land if the people buying it knew they were going to have to drill a completely new well?

A. Possibly yes. There was $23,000 worth of equipment in the hole. There was half a [33] section of perfectly level ground. $6,000 gas line into it. I don't think that was an unreasonable price.

(Deposition of Elmer F. Shepard.)

Q. It wouldn't have been an unreasonable price even though the well were completely useless?

A. It depends on how bad they wanted the ground, who wants it and what they are paying for ground.

Q. Are you acquainted with the land of Gordon Cameron next to the land in question?

A. Yes.

Q. What is his principal crop? A. Cotton.

Q. Do most of the farms in the area raise cotton?

A. If they have the base, they do.

Q. And were you acquainted with the fact that Cal-Nine—Mr. Otto and Mr. Haas were going to raise cotton?

A. I knew—I think they would have been foolish if they didn't grow cotton. The place had a base on it.

Q. Did you believe they were going to raise cotton?

A. I had every reason to believe they were.

Q. Then there is no doubt in your mind it [34] is essential for a cotton crop to have an adequate supply of water during August and September?

A. Yes, I think—yes.

Q. Would you say there is no necessary correspondence between acres of cotton and gallons that is necessary?

A. No two people farm alike. One man might utilize his tail water and farm several more acres than his neighbor.

Q. You don't think there is any minimum set?

(Deposition of Elmer F. Shepard.)

A. I wouldn't want to state it. There is possibly, but I wouldn't know what it would be.

Q. You did not know after Mr. Cameron finished deepening the well around the beginning of 1954, that there was a serious obstruction or break in your well at about 500 feet?

A. A serious obstruction or break?

Q. Right. A. No.

Q. In that part of the well that was deepened by Mr. Cameron in 1954, was there any casing put down for the deepened part?

A. No, the casing was 1,033, and it was deepened from that point down—that is a common practice on lots of wells, is to case the top part and leave the bottom part open. [35]

Q. Isn't that pretty much of a temporary source of water when you go down without casing?

A. I wouldn't say that it is. There is a number of wells in the state that has no casing in them whatever, that are pumping.

Q. There are some wells in the Harqua Hala Valley of that nature?

A. They have some uncased portion of the holes. One next to me, the neighbor south of me, I think has possibly 100 feet uncased on the bottom.

Q. And that would be expected to run indefinitely without filling up?

A. I wouldn't know what you would expect from it. That is out of sight and——

Q. Would you expect an uncased well to fill up sooner than a cased well?

(Deposition of Elmer F. Shepard.)

A. Probably up to the point of the casing.

Q. How long would you say it would take, would you give any estimate?

A. I have no idea. That is clear over my head, and there is no engineer in the state that could answer a question like that, a geologist or otherwise.

Q. Mr. Shepard, did you tell Mr. Otto that part of your well was uncased? [36]

A. He never asked me. It was still my well up until I sold it. You understand this happened a year before.

Q. You didn't feel it was necessary to tell him part of it was uncased?

A. There is a log that is filed with the State of Arizona. Any time a person wants that information he can get it, it is open.

Q. Did you tell him the depth of the well?

A. I believe it was mentioned, yes.

Q. And what depth did you tell him?

A. You are going back to things like that——

Q. If you don't remember, just say so.

A. Well, I don't remember. I would have told him the correct depth if I told him. But whether he asked and whether I told him, I don't know.

Q. Did you tell him there was a flange in the spout? A. No.

Q. And you didn't feel it was necessary to tell him then?

A. No more than I felt it necessary to tell him the breakdown was caused by decreased gas pressure. That was all history. That was part of the operation. [37]

Mr. Rehnquist: No more questions.

Mr. Burch: That will do here.

/s/ ELMER F. SHEPARD,
(Signature of Witness.)

[Endorsed]: Filed May 21, 1956. [38]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Report of Proceedings had and evidence taken in the above-entitled cause before the Honorable Dave W. Ling, Judge of said court, in his courtroom in the United States Courthouse, at Phoenix, Arizona, commencing on the 17th day of May, A.D. 1956, at the hour of ten o'clock a.m.

Present:

RAGAN & REHNQUIST, by
WILLIAM H. REHNQUIST and
KEITH W. RAGAN,
Appeared for Plaintiff.

KRAMER, ROCHE & PERRY,
F. HAZE BURCH,
Appeared for Defendants.

The Clerk: Civil No. 2343, Cal-Nine Farms, Plaintiff, versus Elmer F. Shepard and Kathryn M. Shepard, his wife, Defendants, for trial.

Mr. Rehnquist: Plaintiff is ready.

Mr. Burch: Defendants are ready.

The Court: All right.

Mr. Rehnquist: Your Honor, at this time we submit a written motion for leave to file an Amended Complaint.

The Court: All right. Do you have any objections?

Mr. Burch: No, your Honor, if we are allowed to amend our answer. That will be the necessary thing. I may be able to dictate an amended answer into the record, with the Court's leave, and if the Court wishes, to file at a later date a written answer.

The Court: All right.

Mr. Burch: With the Court's permission, for the purpose of the record, in answer to the Amended Complaint of the plaintiff—and with the stipulation, if that is correct, counsel, that we may file a written answer, if necessary, at a later time?

Mr. Rehnquist: That is correct.

The Court: You may.

AMENDED ANSWER

Mr. Burch: In answer to the Amended Complaint, defendants, and each of them, admit the allegation in the first [2*] count of Paragraph I, deny the allegations contained in Paragraphs II, III, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV of said amended complaint, and defendants, in regard to Paragraph IV of said Amended Complaint, admit that Cal-Nine Farms

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

entered into an agreement to purchase the land described in said Amended Complaint, deny that Cal-Nine Farms exercised any option right.

Defendants deny each and every, all and singular, remaining allegations in the complaint not specifically admitted heretofore; wherefore, the defendants pray that the plaintiff take nothing by its complaint, and that defendants have judgment against plaintiff for their costs necessarily incurred herein, or such further relief as the Court deems proper.

Mr. Rehnquist: Your Honor, we would also like to submit to the Court at this time a written Memorandum of Authorities.

The Court: Trial Memorandum?

Mr. Rehnquist: Trial Memorandum.

The Court: All right.

Mr. Rehnquist: And may the record show that counsel for the defendant has been given a copy of that.

Mr. Burch: It may so show.

The Court: Does that dispose of the preliminaries?

Mr. Rehnquist: Yes, your Honor. [3]

The Court: All right, call your first witness.

Mr. Rehnquist: At this time we would like to invoke the rule and exclude non-party witnesses.

The Court: All right. Call your witnesses up on both sides.

(Witnesses present were duly sworn.)

The Court: Witnesses will be required to re-

main out of the Courtroom during the course of the trial. That doesn't apply to the parties, however.

(Witnesses other than parties were excluded from the courtroom.)

Mr. Rehnquist: I will call Mr. Otto.

ERNEST H. OTTO

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Ernest H. Otto.

Q. Where do you reside? A. In Buckeye.

Q. How long have you lived there?

A. Since March of 1955.

Mr. Burch: Mr. Otto, I can't hear you. [4]

The Witness: Since March of 1955.

Q. (By Mr. Rehnquist): Where did you live before that? A. Fresno, California.

Q. How long did you live over there?

A. I was born and raised there.

Q. In Fresno? A. Yes.

Q. What is your present occupation?

A. Farming.

Q. Are you a shareholder of Can-Nine Farms, Incorporated? A. Yes.

Q. Do you occupy an office in that corporation?

A. Yes.

Mr. Burch: If the Court please, we will object.

(Testimony of Ernest H. Otto.)

I think the best evidence of that is the corporate records.

The Court: That is probably true. Go ahead and answer.

Mr. Burch: It may become important as a law point.

The Court: All right, if it does I will insist on having the record.

Mr. Rehnquist: Go ahead and answer.

The Witness: Yes.

Q. (By Mr. Rehnquist): What is that office?

A. President. [5]

Q. What was your occupation in California?

A. Farming.

Q. How long have you been in farming, both in California and in Arizona? A. About 20 years.

Q. Did you farm cotton? A. Yes.

Q. How much of that time?

A. About 5 years.

Q. How far did you get in school, Mr. Otto?

A. I went to the 10th grade.

Q. Then you went to work?

A. That is right.

Q. Are you acquainted with farm land in the Fresno area? A. Yes.

Q. Are you acquainted with the water table there? A. Yes.

Q. What in your experience is the depth of a relatively deep well by the standards of the Fresno area?

(Testimony of Ernest H. Otto.)

Mr. Burch: I object to the question as having no probative value in regard to this particular area.

The Court: It may be. I don't know. Go ahead. Can you answer the question?

Mr. Burch: We make further objection that there has been no foundation laid. [6]

The Witness: In the area I was from, it was from 100 to 150 feet.

Q. (By Mr. Rehnquist): Are you familiar with pumps on wells in the Fresno area?

A. Yes, where I farm.

Q. And what would you say was the average life of a set of bowls on the pumps over there?

Mr. Burch: Same objection, no foundation laid.

The Court: Same ruling. Go ahead.

The Witness: I would say 10 to 15 years.

Q. (By Mr. Rehnquist): When did you first visit Arizona?

The Court: What part of a pump is that?

The Witness: That is the bowls.

The Court: What are the bowls of the pump?

The Witness: The bowls is the part that pumps up water from the bottom, brings up your water.

The Court: Down in the well?

The Witness: Yes.

The Court: What would wear them out, sand?

The Witness: What was that?

The Court: What would wear them out, sand?

The Witness: Well, sand, I imagine. [7]

The Court: Sand?

The Witness: I imagine.

(Testimony of Ernest H. Otto.)

The Court: All right.

Q. (By Mr. Rehnquist): When did you first visit Arizona? A. In 1953.

Q. And what was the purpose of that visit?

A. To pick cotton.

Q. How long did you stay here?

A. Well, I was just here off and on. I had the men operating cotton pickers for me, and I would just go over and look after them, and go back to Fresno again.

Q. Was that just during the cotton picking season? A. Yes.

Q. When did you visit Arizona again?

A. In 1954.

Q. What was the purpose of that visit?

A. To pick cotton with machines again.

Q. In what areas did you pick cotton in 1954?

A. In the Harqua Hala Valley.

Q. Where is that, the Harqua Hala Valley?

A. About 40 miles west of Buckeye.

Q. For whom did you pick cotton?

A. I picked for Mr. Gordon Cameron, and the Centennial Farms. [8]

Q. Those are both in the Harqua Hala Valley?

A. That is right.

Q. Are you acquainted with the defendant in this action, Elmer Shepard? A. Yes.

Q. Do you see him in the courtroom now?

A. Yes.

Q. Would you point him out?

(Testimony of Ernest H. Otto.)

A. He is sitting right next to the other lawyer there.

Q. When did you first meet Mr. Shepard?

A. It was in 1954.

Q. While you were picking cotton?

A. That is right.

Q. Did you ever have occasion to talk to him about buying some property he owned in the Harqua Hala Valley? A. Yes.

Q. When was that?

A. I would say it was about October, 1954.

Q. And what were the circumstances of that conversation? Was anybody else present?

A. No, just Elmer and I.

Q. And will you state that conversation?

Mr. Burch: If the Court please, could we find out where this conversation took place? [9]

Q. (By Mr. Rehnquist): Where did the conversation take place?

A. It took place on a ranch that Gordon Cameron was renting. I believe they call it the Stall place.

Q. Would you state the conversation?

A. Well, I was on the end of the rows there just waiting for the pickers to come up, and Elmer, he rode up on horseback that day, and we just had a general conversation, and I asked him if their ranch was for sale, that is, Gordon Cameron and Ed Swindle told me it was for sale, and I just wanted to find out if it was.

Q. And what did Mr. Shepard answer?

A. He said, yes, he was trying to sell it.

(Testimony of Ernest H. Otto.)

Q. Was there any discussion of price?

A. Yes.

Q. Did Mr. Shepard quote a price at that time?

A. Yes.

Q. What price did he quote? A. $80,000.

Q. Had you ever seen the Shepard land during the cotton growing season prior to this time?

A. No.

Q. Had you ever seen the well running on the land before this time? A. No.

Q. Did you have any discussion as to the well on the [10] land at this time, at that time you first talked to Mr. Shepard about the property?

A. I think we did.

Q. Will you state that discussion?

A. Well, I asked him several questions about it, and I asked him about the land and the condition of the place.

Q. And what were his responses?

A. Well, he said it was a good ranch.

And I asked him why he wanted to sell it, and he said he had trouble with his eyes. He said the dust out there bothered his eyes, and he wanted to sell it so he didn't have to go out there any more.

Q. Did you later that same year have a conversation with Mr. Shepard about his ranch, on the premises of the ranch itself? A. Yes.

Q. When would that be, to the best of your recollection? A. That was in November.

Q. And who else was present?

A. Henry Haas.

Q. And Mr. Shepard was present?

(Testimony of Ernest H. Otto.)

A. And Mr. Shepard, yes.

Q. Was anyone else present?

A. There was someone else on the ranch operating a cotton picker, but he was not talking [11] with us.

Q. He was not actually participating in the conversation? A. No.

Q. Did you at that time talk about the well on the land? A. Yes.

Q. Did Mr. Shepard make any statement as to the output or capacity of the well? A. Yes.

Mr. Burch: I will object to counsel leading the witness. He has done that two or three times in a row.

The Court: Go ahead.

The Witness: Yes.

Q. (By Mr. Rehnquist): What was that statement?

A. I asked him what the output of the well was, and he told me it was 2,200 gallons per minute.

Q. Were those the words he used?

A. Yes. He said Jules Turner estimated the pump as throwing 2,400 gallons per minute, but he said he didn't think it was quite doing that. He said, "I think it is throwing 2,200 gallons."

Q. Did he run the well on the land at that time?

A. Yes.

Q. He turned on the pump? A. Yes.

Q. How long did it run? [12]

(Testimony of Ernest H. Otto.)

A. I would say 10 or 15 minutes, just a short while.

Q. Did you make any observation as to the character of the water coming out of the pump?

A. Yes.

Q. What observation was that?

A. Well, we seen the water coming out. Is that what you mean?

Q. Well, did you notice anything about the water coming out of the pump?

A. Yes, I noticed it was unusually dirty looking water.

Q. Did you say anything to Mr. Shepard about that? A. Yes.

Q. What did you say?

A. I told him, I said, "Boy, that is sure dirty looking water coming out of there."

Q. What did he say?

A. He said, "Yes, they all do that when you first start them up."

Q. Did Mr. Shepard make any other statements to you at this time about the capacity of the well, or its condition? A. Yes.

Q. What were those statements?

A. He told us the well and the pump, and everything, was in good condition, that it was a gravel packed well, and it was in good condition. [13]

Q. Did you make any inquiry as to whether he had ever had any trouble with the well?

A. Yes.

Q. What did you ask him?

(Testimony of Ernest H. Otto.)

A. I asked him if he ever had any trouble with his well.

Q. And what did he say?

A. He said, "Well, we had a little trouble here. But," he said, "you really couldn't class it as trouble." He said that the pump people told him the engine was not tuning up right, and the engine people told him there was something wrong with his pump, so he said they ended up pulling the pump out of the hole, and found out everthing was in good condition, and there was something wrong with the engine, and he had that taken care of.

Q. Did he make any further statement to you about the previous history of the well?

A. I don't believe he did.

Q. Did he ever say anything about Mr. Cameron having gone back in the well? A. Yes.

Mr. Burch: We object to his leading again. If Mr. Rehnquist wants to testify, we suggest he take the stand. That is not proper examination.

The Court: That last was leading.

Mr. Rehnquist: I beg your pardon. [14]

The Court: That last was leading. Ordinarily it doesn't make too much difference about a leading question, unless it was suggesting the answer. What difference does it make? It saves time.

Mr. Burch: It does suggest answers, if the Court please.

The Court: He didn't suggest any answers. Go ahead.

The Witness: What was the question?

(Testimony of Ernest H. Otto.)

Mr. Rehnquist: Read the question, please.

(The question and answer were read.)

Q. (By Mr. Rehnquist): And what was that statement?

A. He told me that Mr. Cameron went back into the well, and they deepened that hole. I forget exactly how many feet, but he said from what depth to what depth that he went.

Q. Did Mr. Shepard make any statement to you at this time about the tube capacity of the well?

A. Yes.

Q. What was that statement?

A. He said it would handle 70 to 75 siphon tubes.

Mr. Burch: Is the Court aware of what he is speaking of, in tubes?

The Court: What was that?

Mr. Burch: When the witness talks about tube capacity, is the court aware of what he is talking about?

The Court: No. [15]

Q. (By Mr. Rehnquist): What are these tubes you just referred to?

A. The siphon tubes are pipes that you lay over your ditch bank that take the water out of there into the furrows onto your cotton.

The Court: What size pipes were those?

The Witness: They were two-inch pipes, these particular pipes were two-inch.

Q. (By Mr. Rehnquist): Were there some pipes

(Testimony of Ernest H. Otto.)

visible at the time Mr. Shepard made this statement to you? A. Oh, yes.

Q. What diameter were those pipes?

A. Two-inch pipes.

Q. Did you make any inquiries of anyone else regarding the well on this propert, ? A. Yes.

Q. Was this before the time you talked to Mr. Shepard in the conversation you just related, or after? A. Before.

Q. Who else did you make inquiries of?

A. I spoke to Gordon Cameron about it.

Q. Does Mr. Cameron operate a ranch in that area?

A. Yes, he is a neighbor, he adjoins me on the west, and he is also a well driller. And he deepened this well. That [16] is the reason I questioned him, because I thought he knew about it.

Q. When you say he adjoins you on the west, I take it before you bought the property he would have adjoined Elmer Shepard on the west?

A. Yes.

Q. What inquiry did you make of Mr. Cameron?

A. I was just trying to pick up general information on the ranch, and I asked him about the land, and the water conditions, and everything in general.

Q. And what did Mr. Cameron state to you?

A. Well, he kept telling me it was an awful good ranch, and that the water conditions were all right on it, and the land was very good.

Q. Who else did you make inquiry of?

(Testimony of Ernest H. Otto.)

A. Ed Swindle.

Q. And who is Mr. Swindle?

A. He is the manager of the Centennial Farms.

Q. And does he operate a ranch for Centennial Farms in that area? A. Yes.

Q. What inquiry did you make of Mr. Swindle?

A. It was about the same thing as I did to Mr. Cameron. I was new in the territory, and I was trying to pick up information from the neighbors as to how good this ranch, and everything, [17] was.

Q. And what did Mr. Swindle tell you in response to your inquiries?

A. He told me about the same thing, that it was an awful good piece of land.

Q. Did he say anything more than that?

A. Well, we talked a lot. I can't remember the exact words we talked about. He just referred to it as a good place.

Q. Did you shortly after the conversation you have described with Mr. Shepard in the middle of November enter into a written agreement with him?

A. Yes.

Mr. Rehnquist: May this be marker for identification?

The Clerk: Plaintiff's Exhibit 1 for identification.

(Said Option to Purchase was marked as Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 1 for identification, is this that Agreement? A. Yes.

(Testimony of Ernest H. Otto.)

Q. Does it bear your signature? A. Yes.

Q. Was it signed by Mr. Shepard in your presence? A. Yes.

Mr. Rehnquist: We will offer this in evidence, if the [18] Court please, as Plaintiff's Exhibit Number 1.

Mr. Burch: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit Number 1 in evidence.

(Said Option to Purchase was received in evidence and marked as Plaintiff's Exhibit 1.)

Q. (By Mr. Rehnquist): Would you read the title of that Agreement, Mr. Otto, the underscored part? A. Option to Purchase.

Q. At the time of the execution of this Option Agreement, did Mr. Haas also sign the agreement?

A. Yes.

Q. And is Mr. Haas here in the courtroom today? A. Yes.

Q. Would you point him out to the Court?

A. Sitting on the end of the table.

Q. And is Mr. Haas a shareholder in Cal-Nine Farms now? A. Yes.

Q. Does he occupy an office in that corporation?

A. Yes.

Q. What office is it?

A. Vice president.

Q. At the time of the execution of this Option Agreement, was Cal-Nine Farms incorporated? [19]

(Testimony of Ernest H. Otto.)

A. We were in the process of being incorporated.

Q. Was it incorporated? Had it been officially made a corporation?

A. Not when we took this option, no.

Q. Did you contemplate incorporating? Would you have if you exercised the Option? A. Yes.

Q. Did you pay Mr. Shepard the $2,000 required by the Option Agreement?

A. Mr. Haas did, yes.

Q. And who had put up this money?

A. Well, it was a group of fellows from California.

Q. And did Mr. Shepard know at that time that there were more people than just you and Mr. Haas interested in the property?

A. Yes, we told them.

Q. Did you have any further discussion regarding the property with Mr. Shepard at any later time? A. Yes.

Q. Where was that?

A. It was in a drugstore in Buckeye.

Q. Was this before the Escrow instructions were executed? A. No, this was after.

Q. Did you have any further discussion before the Escrow instructions were executed? [20]

A. How was that again?

Q. Did you have any other conversation with Mr. Shepard about this ranch when you and Mr. Haas were over here in November?

A. Yes.

Q. Where was that?

(Testimony of Ernest H. Otto.)

A. Well, one time was in the Buckeye Motel, I remember.

Q. Who was present there?

A. There was Henry Haas, and Elmer Shepard, myself, and a fellow by the name of Woody.

Q. Do you know Woody's full name?

A. No, I don't.

Q. And what was the conversation that took place there with regard to the ranch?

A. Oh, we just had a general conversation, and I do remember we tried to buy the ranch for a little less money from Elmer that night, and also we were getting, we were trying to get him to give us a few more acres of cotton allotment that went with the ranch, and just talking general.

Q. You did have a discussion pertaining to the cotton allotment of the ranch, though?

A. Oh, yes.

Q. Did Cal-Nine Farms ever exercise the option given by the option agreement? A. Yes. [21]

Mr. Burch: If the Court please, we are going to object to the witness answering that question again, that it is a matter of corporate records as to whether they exercised an option, or not, and this man's conclusion to that effect is a matter of proof.

Mr. Rehnquist: Your Honor, we are going to offer in evidence the Escrow Instructions pursuant to an Agreement of Sale executed by Cal-Nine Farms and defendant Elmer Shepard, and reciting that the $22,000 had been paid under the Option.

Mr. Burch: Let us get it in.

(Testimony of Ernest H. Otto.)

Mr. Rehnquist: Okay. May that be marked for identification?

The Clerk: Plaintiff's Exhibit 2 for identification.

(Said Escrow Instructions were marked as Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 2 for identification, does this instrument bear your signature? A. Yes.

Q. And is that the signature of Henry Haas?

A. I believe it is.

Q. And did Mr. Shepard sign that in your presence? A. Yes.

Mr. Rehnquist: We will offer number 2 in evidence.

Mr. Burch: No objection, your Honor. [22]

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Said Escrow Instructions were received in evidence and marked as Plaintiff's Exhibit 2.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 2 in evidence, will you read the caption on that.

A. "Escrow Instructions to—Phoenix Title & Trust Co."

Q. And will you read this part at the bottom right above the signatures?

A. "Cal-Nine Farms."

Q. By——

(Testimony of Ernest H. Otto.)

A. "By Ernest H. Otto. By Henry Haas."

Q. Did you on behalf of Cal-Nine pay the additional sum of $18,000 to Mr. Shepard?

A. Yes.

Q. When was that done?

A. I believe it was January the 11th of 1955.

Q. That sum was paid at the same time you signed the Escrow Instructions?

A. That is right.

Q. What was the total purchase price called for by this Agreement? A. $80,000.

Q. And what was the total acreage of land involved? [23] A. 320 acres.

Q. Where is this property you bought with relation to Buckeye?

A. It is about 40 miles west of Buckeye.

Q. Is it desert land?

A. Well, I guess you would class it as desert land.

Q. And the well to which your discussions have related is the only water supply on that land?

A. That is right.

Q. Is there a house on the property?

A. No.

Q. Do you live on the property since you bought it? A. No.

Q. You still live in Buckeye?

A. That is right.

Q. When did you first have occasion to turn on the well after you had bought the property ?

A. I believe it was April of 1955.

(Testimony of Ernest H. Otto.)

Q. Going back for a minute to the conversation with Mr. Shepard in November, did you observe the output of the well at that time? A. Yes.

Q. What did the well appear to you to be putting out? A. About 2,000 gallons a minute.

Q. Did you notice anything about the output of the well [24] when you turned it on in April after you had bought the property? A. Yes.

Q. What did you notice?

A. Well, I found out it was not throwing as much water as we were led to believe it was throwing.

Q. How did you find that out?

A. Well, when we began to start our siphon pipes to irrigate, it wouldn't run near as many pipes as it was supposed to run.

Q. And what size pipe were you using at this time? A. Two-inch.

Q. How many pipes would it run?

A. We started 55 pipes.

Q. Did the well still appear to be putting out as much water as it had when you looked at it in November? A. Yes.

Q. Did you make a further investigation of the spout at this time? A. Yes.

Q. What did you discover, if anything?

A. We discovered that someone had welded a piece of iron, a flange, or whatever you want to call it, on the inside of the discharge pipe, and the water would come out and hit this and give it an appear-

(Testimony of Ernest H. Otto.)

ance that it was throwing more water [25] than was coming out of it.

Q. Mr. Otto, will you draw on the blackboard what you mean by that?

A. (Witness makes diagram.) It had the appearance like this. It was a 12-inch pipe, and then they had welded an elbow or down-turn, or whatever you want to call it, on there. Then where this straight pipe ended, the 12-inch pipe ended, before this was welded on, there was a piece of iron welded on the inside of the pipe. (Indicating.)

Q. What effect, if any, did that have on the appearance of the output of the well?

A. It made it look like there was more water coming out than actually was coming out, because it kind of put a pressure on the water behind.

Q. Were you familiar with a device such as this inserted in spouts? A. No.

Q. Had you ever seen one before? A. No.

Q. What did you have to do in order to see that little device that was welded in there?

A. Well, there was a box, cement box, a weir box, they call it, that was built kind of like this, where the water poured into, and this was laying flat on the ground, so when you were on the ground you couldn't very well look in there, [26] so if you put your head way down, or got on the box and looked up around the elbow, then you could see it.

Q. It was not visible to the naked eye, then?

A. No.

Q. What would be your estimate of the output of

(Testimony of Ernest H. Otto.)

the well on the day you turned on the irrigation, in the spring?

Mr. Burch: If the Court please, I think we ought to have some foundation laid that he is capable of making that estimate.

The Court: All right.

Q. (By Mr. Rehnquist): You have been farming for how long, Mr. Otto?

A. About 20 years.

Q. During that time you have used wells?

A. Yes.

Q. And you have irrigated? A. Yes.

Q. And you have used siphon tubes?

A. Yes.

Q. And is it possible to reach some general conclusion as to the output of a well from a combination of observation of the water coming out the spout, and the number of tubes that it will run?

Mr. Burch: He is now qualifying him by doing the very thing we object to, without foundation.

The Court: Go ahead. [27]

Mr. Rehnquist: Answer the question.

The Witness: Yes.

Q. (By Mr. Rehnquist): What would you estimate the output of this well at the day you turned it on, in the spring of 1955?

Mr. Burch: Same objection.

The Witness: I would estimate it at 1,300 to 1,400 gallons of water.

Q. (By Mr. Rehnquist): If this output at that time had remained constant throughout the summer,

(Testimony of Ernest H. Otto.)

would it have been sufficient to irrigate the amount of cotton which you were allowed to plant, and did plant that year? A. Yes.

Q. How many acres was that?

A. We finally wound up with 105 acres.

Q. Is there any rule of thumb that you know of, through your experience as a cotton farmer, as to the number of gallons per minute required to irrigate cotton acreage?

A. The general saying among everybody is 1,000 gallons per minute will handle 100 acres of cotton.

Q. What happened to the output of the well in the succeeding months of the growing season?

A. Well, it just kept decreasing, steadily decreasing. [28]

Q. And what finally happened to the well?

Mr. Burch: We make the same objection, unless he can show he knows, if the Court please, without giving a mere opinion without foundation.

Mr. Rehnquist: Your Honor, he was farming out there all summer.

The Court: Ask him what happened to the well. Maybe it dried up. I don't know. Go ahead.

The Witness: It kept decreasing so much that in September, the early part of September, I shut it down. It was just running a very small stream of water.

Q. (By Mr. Rehnquist): What did you estimate the gallons per minutes at that time?

A. At that time, I would say 250, 300 gallons.

(Testimony of Ernest H. Otto.)

Q. Did you ever consult anyone about this well?

A. Yes.

Q. Who?

A. Gordon Cameron, the well man.

Q. When was the first time you talked to him about it?

A. Well, just shortly after we started it. We started our conversations about this well.

Q. Did you have a conversation with him about it in June or early July of 1955? [29]

A. Yes, I asked him if he wouldn't come out the first part of July.

Q. Why did you ask him at that time?

A. Well, the well was decreasing to a point that I was getting alarmed, and also the pump was sinking into the ground.

Q. Did you ask his advice at that time?

A. Yes.

Q. And what advice did he give you?

A. He told me, he said, "Well," he said, "don't ever shut this thing off."

He said, "If you do, you're going to be completely without water, without a well, without anything," and he said, "You've got too good a crop here started to take any chances on it." He said, "Don't shut it off."

Q. Did you leave the pump running?

A. Yes.

Q. Was that in reliance on Mr. Cameron's advice? A. Yes.

(Testimony of Ernest H. Otto.)

Q. Did you have any other conversations with Mr. Cameron about the well?

A. Yes, I had quite a few with Mr. Cameron.

Q. Did you have a conversation with him in October of 1955? A. Yes.

Mr. Burch: If the Court please, this is all hearsay. [30] I haven't wanted to object, because maybe the Court wants to hurry it along, but I certainly do object now.

Mr. Rehnquist: Your Honor, in a misrepresentation case, the reasonableness of the Plaintiff's actions in attempting to mitigate damages is relevant, and it is not hearsay for that purpose, if he followed the advice of a man he believed to be a well expert. The mere fact that it was stated to him is relevant for that purpose. It is just the same thing when you are trying to prove notice.

The Court: It might be.

Q. (By Mr. Rehnquist): Where did this conversation take place?

A. It took place in my home in Buckeye.

Q. Who was present?

A. Gordon Cameron, and his wife, and my wife, and myself.

Q. This was after you had turned the well off?

A. That is right.

Q. Had you spoken to Mr. Cameron before this conversation about the possibility of repairing the well? A. Yes.

Q. What did Mr. Cameron tell you at this time?

(Testimony of Ernest H. Otto.)

Mr. Burch: We make the same objections. Hearsay.

The Court: All right, go ahead.

The Witness: Well, he come to the house that morning, and he said [31] that he just decided he might as well lay the cards on the table and make it plain to me that I shouldn't try to repair that well.

He says, "I don't care if I get the job, or someone else gets it, but," he says, "I don't want you to spend five, six, seven thousand dollars working on that well, because," he says, "It is impossible to repair."

And I asked him what made him think so, and he kind of laughed, and he said, "Well, I'm not thinking," he said, "I know."

I said, "How do you know?"

He said, "I was in that hole last year," and he said, "That casing was broke or collapsed at that time when we went into that hole." And he said, "We put our drill into it, and at 477 feet it stopped. So they pulled that bit out and put on smaller sizes." And he said they finally got, I believe it was, an 11 or 12-inch bit. He said they stayed there a couple of hours and drilled through the bad place. Then they went on down and deepened the well for Elmer. "But," he said, "It was impossible to repair the well."

Q. (By Mr. Rehnquist): Did you, after the cotton season, replace the well? A. Yes.

Q. Who drilled the new one for you?

(Testimony of Ernest H. Otto.)

A. Gordon Cameron. [32]

Q. When was this done?

A. The end of December of 1955

Mr. Rehnquist: May we have this marked for identification?

The Clerk: Plaintiff's Exhibit 3 for identification.

(Said Statement was marked as Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 3 for identification, is that the bill you received from Gordon Cameron for his services?

A. That is right.

Q. In drilling you this new well? A. Yes.

Mr. Rehnquist: We will offer No. 3 in evidence.

Mr. Burch: If the Court please, we will object to this being admitted in evidence. Certainly no measure of damages would allow this to be admitted without first showing it is of the same kind of well, same materials, same depth, same thing he bargained for. There hasn't been this showing yet. Therefore, this bill for costs, labor, and repair has no probative value. You must first establish it has some relationship in the measure of damages to the original well. It may have been a bigger well, a smaller well. There is no showing yet.

The Court: All right. What kind of a well was it? [33]

Mr. Rehnquist: Your Honor, we plan to call Mr. Cameron in this matter.

(Testimony of Ernest H. Otto.)

The Court: You will have him testify?

Mr. Rehnquist: Yes.

The Court: All right. That may be received. I thought he might have been unavailable.

Mr. Burch: If the Court please, I suggest before they testify from this that we find out from Mr. Cameron what the facts are.

The Court: There is no jury here.

Mr. Rehnquist: We can't prove our whole case at the same minute. That was received, your Honor?

The Court: Yes, it may be received.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(Said Statement from Gordon Cameron was received in evidence and marked as Plaintiff's Exhibit 3.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 3 in evidence, what is the total amount of that bill? Will you read from the bill?

A. $17,541.73.

Q. Did you incur any other expenses in connection with the drilling of this new well?

A. Well, yes, we had to put up a new pump base.

Q. And who did that work for you?

A. A cement contractor by the name of Dan Fuller. [34] And we also had to put new bowls in this pump.

Q. Who did that work for you?

A. Arizona Engine and Pump Company.

(Testimony of Ernest H. Otto.)

Mr. Rehnquist: May we have this marked for identification?

The Clerk: Plaintiff's Exhibit 4 for identification.

(Said documents were marked as Plaintiff's Exhibit 4, for identification.)

Q. (By Mr. Rehnquist): Handing you plaintiff's Exhibit 4, for identification, is this top statement a bill you received from Arizona Engine and Pump Company in connection with the replacement of the well?

A. This was a bill just to remove the old pump out of the well, this one.

Q. And was this statement in connection with their services in taking the pump out of the old well and replacing it in the new well?

A. That is right.

Mr. Rehnquist: We offer No. 4 in evidence.

Mr. Burch: We make the same objection. No foundation laid.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(Said documents, Arizona Engine & Pump Co., were received in evidence and marked as Plaintiff's Exhibit 4.) [35]

Q. (By Mr. Rehnquist): Did you also incur an obligation in connection with the gravelling of the new well at this time? A. Yes.

Q. And to whom was that obligation?

(Testimony of Ernest H. Otto.)

A. Joe Conway Gravel Company, I believe is the name of it.

Mr. Rehnquist: May it be marked as Plaintiff's Exhibit 5 for identification.

The Clerk: Plaintiff's Exhibit 5 for identification.

(Said Statement, Joe Conway, was marked as Plaintiff's Exhibit 5 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 5 for identification, is that the statement of charges you received from Joe Conway?

A. That is right.

Mr. Rehnquist: We will offer No. 5 in evidence.

Mr. Burch: We make the same objections. No foundation laid.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(Said Statement, Joe Conway, was received in evidence and marked as Plaintiff's Exhibit 5.)

Q. (By Mr. Rehnquist): What did you do with the pump that was in the old [36] well, Mr. Otto?

A. Well, we couldn't use the bowls off of the pump, so we replaced them with new bowls.

Q. But you moved the gearhead and the remaining part of the pump over to the new well?

A. Oh, yes.

Q. What did you do with the engine on the old pump?

(Testimony of Ernest H. Otto.)

A. We moved it over, and we are using the engine.

Q. What did you do with the casing of the old well?

A. We tried to salvage as much casing as we could out of the old well, so they set the derrick over the well, and they recovered 361 feet of old casing.

Q. Were you present during most of the operations to remove the pump? A. Yes.

Q. Did you see the pump when it was pulled?

A. Yes.

Q. What was the appearance of the pump when it was pulled?

A. Well, the bowls were worn, and as I remember, they had an awful time getting it out of the hole. They said it was sanded up down there. The bowls were covered with sand.

Mr. Burch: If the Court please, that is hearsay again. We are going to object to it.

The Court: All right. What do you know of your own knowledge? [37]

The Witness: Of my own knowledge, I knew they had an awful time. They wouldn't pull this pump up. They radioed to Phoenix to try to get me, to find out where I was at before they would pull on it any more. They said they wouldn't any more on their own, because they were afraid they were going to pull this shafting in two. It was stuck in the bottom.

Q. (By Mr. Rehnquist): Was there any at-

(Testimony of Ernest H. Otto.)

tempt made in your presence to put a plumb down in the well after the pump was pulled?

A. Yes.

Q. Will you describe that attempt and its result?

Mr. Burch: I will object to that. That has nothing to do with this matter, what they did after they got in there and pulled the bowls.

The Court: The casing was in there, was it not?

The Witness: Yes.

Mr. Burch: There is no showing it was. There is no showing what damage was done when they pulled the bowls.

The Court: Find out.

The Witness: Yes, they did. The man working for Gordon Cameron, I forget what they call it, he dropped, it was a small wire on a pole, they put a heavy weight on it, and let it down into the well, and they wanted to find out the depth of the well. Then he pulled it out and he laid it out on the ground [38] and measured it with 100-foot tape, and the well was just 380 feet deep, and it was filled up with sand up to that point.

Q. (By Mr. Rehnquist): Have you tested your new well?

A. I have pumped it, but I haven't had it officially tested.

Q. The only way you would know about its output is by estimate? A. Yes.

Q. What would you estimate its output at?

(Testimony of Ernest H. Otto.)

Mr. Burch: We will object to his making an estimate. No foundation.

The Court: I don't think it makes any difference.

Mr. Burch: At least for the record, he testified in the beginning he came from California.

The Court: I don't want to hear any more argument. What difference does it make now?

Mr. Burch: Very well.

The Witness: I would estimate it between——

The Court: You don't have to answer that now. That is a new well?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Rehnquist): Where is the new well located, with respect to the [39] other well?

A. It is about 125 feet north of the old well we abandoned.

Q. Is there also a third well on the property?

A. Yes.

Q. When did you plant your cotton crop last year?

A. It was in the first part of May.

Q. State again how many acres you planted.

A. 105 acres.

Q. Did you fertilize your crop? A. Yes.

Mr. Rehnquist: May this be marked as number 6 for identification?

The Clerk: Plaintiff's Exhibit 6 for identification.

(Testimony of Ernest H. Otto.)

(Said Statements, Fannin's, were marked as Plaintiff's Exhibit 6 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 6 for identification, are these bills you received for fertilizer that you purchased?

A. Yes.

Q. And did you use that fertilizer on the property in question here? A. Yes.

Mr. Rehnquist: We will offer No. 6 in evidence.

The Court: You object to it? [40]

Mr. Burch: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(Said Statements, Fannin's, were received in evidence and marked as Plaintiff's Exhibit 6.)

The Court: We will have our morning recess.

(The morning recess was had.)

The Court: You may continue.

Q. (By Mr. Rehnquist): Mr. Otto, just before recess, you testified that there was a third well on the property? A. That is right.

Q. Was that well ever in operation while you owned the property? A. No.

Q. It is just a hole? A. That is right.

Q. Is it covered? A. Yes.

Q. In what manner is it covered?

A. Well, it has a piece of steel welded over the pipe, and then there is another cover laying over the top of the steel.

(Testimony of Ernest H. Otto.)

Q. During the growing season of last year, did you dust [41] your cotton crop for insects?

A. Yes.

Q. How do you determine when to dust?

A. Well, by watching the cotton plants myself, and also Fannin's fertilizer company at Buckeye, they have a man that comes around once a week and checks the bugs for you, and they take the count of the bugs, and if there are so many, they recommend that you dust.

Q. How many times did you dust last year?

A. Four times.

Mr. Rehnquist: Will you mark this for identification?

The Clerk: Plaintiff's Exhibit 7 for identification.

(Said Statements, Fannin's, were marked as Plaintiff's Exhibit 7 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 7 for identification, are these statements you received from Fannin's for dust you purchased from them last year? A. Yes.

Q. And was that dust all applied to the property here in question, to your cotton crop?

A. That is right.

Mr. Rehnquist: I offer No. 7 in evidence.

Q. (By Mr. Rehnquist): Is this top bill a total of these invoices that are [42] attached?

A. Yes.

Mr. Burch: No objection. That figure is $2,478.64, is that correct?

(Testimony of Ernest H. Otto.)

Mr. Rehnquist: Yes.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 7 in evidence.

(Said Statements, Fannin's, were received in evidence and marked as Plaintiff's Exhibit 7.)

Q. (By Mr. Rehnquist): When did you pre-irrigate last year? A. It was in April.

Q. And how many tubes were running at first, when you first started to pre-irrigate? A. 55.

Q. And those were 2-inch tubes? A. Yes.

Q. What drop or head were you running these tubes at? A. Between four and five inches.

Q. Would you explain to the Court what you mean by drop or head? A. Well, that is——

Q. Use the blackboard, if you want to.

A. I'm not too good of an artist. It is how high the water is in the ditch. Maybe I better. [43]

(Witness makes diagram.)

This will be your ditch bank here, and your water in here. Then the water will be at this level. Then you put this siphon tube in and lay it over the ditch, and where this water runs out of the siphon it would be from four to five inches lower than the water level in your ditch.

Q. That is what you mean by a four to five inch head? A. That is right.

Q. And 55 2-inch tubes was the maximum you could run at this time? A. Yes.

(Testimony of Ernest H. Otto.)

Q. And were all the tubes discharging all of their water into the furrows?

A. All of the water that was coming out of them, yes.

Q. At the end of your pre-irrigation, how many tubes were you able to run? A. 43 to 45.

Q. Would the decline from 55 tubes to 43 or 45 be a decline in the output of the well?

A. No, not all of it, because the further you run your pump from the well, the ditch will absorb a certain amount of water.

Q. How much of this decline was attributable to a decline in the output of the well, would you say?

A. I would say 5, 6, 7 pipes. [44]

Q. How long did it take you to pre-irrigate?

A. It took us about a month.

Q. When did you have your second irrigation?

A. It was in June.

Q. How long an interval was it between the end of your pre-irrigation and the beginning of your second irrigation?

A. From when we quit pre-irrigating?

Q. Yes. A. I would say about 30 days.

Q. Did you still run 2-inch tubes for your second irrigation?

A. No, I bought some plugs that they have that you can reduce the hole size in your pipe. In other words, I put in plugs and made inch-and-a-half pipe out of 2-inch pipe.

Q. Had the tubes you got from Mr. Shepard, along with the land, did they have plugs in them?

(Testimony of Ernest H. Otto.)

A. Yes.

Q. But these weren't the same plugs that you used? A. No.

Q. So you pulled the plugs that you found in Mr. Shepard's for your pre-irrigation, is that right? A. Yes, that is right.

Q. Did the number of tubes you could run drop down during the course of your second irrigation?

A. Yes. [45]

Q. How much?

A. Like I say, we put in inch and a half plugs in these pipes, so when we started the second irrigation, we went back to 55, 56 pipe, and then it steadily decreased again.

Q. Even with the inch and a half tube?

A. That is right.

Q. Does a one and a half inch tube put out a smaller amount of water than a two-inch tube?

A. Oh, yes.

Q. You state during your second irrigation that you had one of your conversations with Mr. Cameron which you have described?

A. I believe we did talk during the second.

Q. And was that the time he told you to leave the pump running?

A. That was either at the end of the second or the beginning of the next irrigation. I'm not sure.

Q. After Mr. Cameron had told you to leave the pump running, did you run it continuously from then on?

A. Yes, I let it on, but it stopped once or twice during that time by itself, and we restarted it.

(Testimony of Ernest H. Otto.)

Q. Was the pump, then, for all practical purposes running continuously, from the early part of July until September? A. That is right.

Q. As of June 1st, would you say you had a good crop in [46] the making? A. Yes.

Q. How can you tell that?

A. Well, it is just by looking at your plants and observing.

Q. Based on your experience as a cotton farmer, could you predicate, in terms of bales as to the acre at that time, what you would harvest in the fall?

Mr. Burch: We object to that as calling for a conclusion. A number of things enter into what his ultimate crop would be. The Arizona rule is that he find out what the productivity of the land was of prior years on land similiar to it. You don't make a guess on what his estimate of the crop will be.

Mr. Rehnquist: That can be brought out on cross-examination.

Mr. Burch: That still is not an estimate of what the crop would be.

The Court: It is speculative.

Mr. Burch: It certainly is.

The Court: How are you going to get at it?

Mr. Burch: The Arizona Courts have determined how.

The Court: They have offered that evidence in this Court a good many times in spraying cases, and gone up, and the Court of Appeals has passed on it. He may answer.

Mr. Burch: As I recall, even in those cases there

(Testimony of Ernest H. Otto.)

was [47] testimony as to what the land had yielded in prior years, not a bare guess.

The Court: Go ahead and answer.

The Witness: At that time, if it progressed favorably from then to the end of the season, I expected two and a quarter to two and a half bales.

Q. (By Mr. Rehnquist): As of July 1st, you say you had a good crop in the making?

A. Yes.

Q. As of August 1st? A. No.

Q. As of September 1st?

A. Absolutely not.

Q. What in your opinion caused the decline in the prospects of this crop? A. Lack of water.

Q. Were there rains in the Harqua Hala Valley last summer? A. Yes.

Q. Do you remember when?

A. They were sometime in July, I believe.

Q. Did these, in your opinion, affect the cotton crop? A. Yes, and no. [48]

Q. Would you tell us what you mean by that?

A. Well, we had some heavy rains there, and several times it come down and broke our ditch, and the water run down through the cotton, and at that time I continued letting my pump run, which Gordon Cameron advised, and I just run it out in the desert until we could rebuild this ditch. And, on the other hand, if we wouldn't have got the rains, I don't believe I would have got as much cotton as I got. The way it is, I feel I got some irrigation out of the rains.

(Testimony of Ernest H. Otto.)

Q. How long did these rains last?

A. It seemed like it was a period of two or three weeks. I'm not sure.

Q. Who picked your cotton for you last year?

A. I picked it myself.

Q. Would you have picked it yourself no matter how large a yield per acre it was?

A. I would.

Q. Where did you have it ginned?

A. At the Hassayampa Gin.

Q. Who is the manager of that gin?

A. Simcoe Walmsoley.

Q. Is he the manager of several gins in that area? A. That is right.

Q. What is the name of the company that runs those gins? A. Western Cotton. [49]

Q. How many bales did you realize from the 105 acres you had in cotton last year? A. 116.

Q. Do you know the gross payments you received from the gin for the 116 bales you had ginned?

A. Around $16,700.

Q. In your opinion, did the lack of water affect the staple length of the cotton you raised?

A. Yes.

Q. Did you ever make any effort to get extra water for your cotton crop when you saw that the well was not going to supply enough?

A. Yes, I talked to Gordon Cameron.

Q. And what was this conversation?

A. Gordon Cameron told me if my well ever quit on me that I should see his foreman he had on

(Testimony of Ernest H. Otto.)

his ranch, and if there was any extra water that they had, I could lead it around to my place. But he said, "The one point I will make clear," he said, "do not lead it through my ranch." He said, "Elmer Shepard done that the year before, and he washed a big canal through his property."

He said, "Take it out into the desert and lead it around to your place."

Q. Who else was present at this conversation?

A. Ed Swindle. [50]

Q. Did you ever take advantage of this offer of water? A. No.

Q. Why not?

A. Well, my pump continued running, and another thing, the desert that Gordon was referring to was about 3 feet higher than the end of his ditch where I would have had to take the water out of, so I would have had to have done considerable scraping on this property before I could have brought the water down to my place.

Q. Did you know who owned the property, over whose land that ditch would have to go?

A. No.

Q. When you discussed the purchase of this property with Mr. Shepard, was the amount of water put out by the well of important consideration to you? A. That is right.

Q. And the condition of the well, and the equipment? A. That is right.

Q. Did you believe Mr. Shepard was telling the

(Testimony of Ernest H. Otto.)

truth when he said the well put out 2,200 gallons a minute? A. Yes.

Q. And did you believe he was telling the truth when he said the well was in good condition?

A. Yes.

Q. When was the first time you suspected the well was [51] not as good as he said?

A. The first time I started it up and irrigated with it.

Q. And when was that?

A. That was in April.

Q. And when had the purchase been completed?

A. In January, January the 11th, I believe it was.

Q. If you had known that the well had a substantially smaller output than Shepard had represented, and was not in good condition, would you have bought the land at that price?

A. Definitely not.

Q. Did you assume from Mr. Shepard's answers to your questions about the well and equipment that he had told you completely and truthfully about all the trouble he had had with the well and equipment? A. Yes.

Mr. Burch: We will object. Certainly his assumptions are of no probative value.

The Court: Did you believe what he told you?

The Witness: Yes.

Q. (By Mr. Rehnquist): If you had known there had actually been considerably more trouble, would you have bought the land at that price?

(Testimony of Ernest H. Otto.)

A. No.

Q. Going back to the tubes for a minute, Mr. Otto, of what material were these tubes made? [52]

A. Aluminum.

Q. How long were the siphon tubes?

A. 7½ feet.

Q. How many bends did they have in them?

A. Three.

Q. And when you were running 55 tubes at a 4 inch head, all of the tubes were running at that head? A. Yes.

Q. And when you were running—First, how many tubes were you able to run just before you shut the well off in September? A. 18.

Q. And what was the head of those tubes?

A. About the same thing.

Q. They were all at that head? A. Yes.

Q. And what was the diameter of the tubes you were running then?

A. An inch and a half at that time.

Q. Those were 2-inch tubes with a plug in them?

A. That is right.

Q. When you speak of a 4-inch head, Mr. Otto, where did you measure that head from, with relation to the diameter of the tube?

A. About the center of the tube. [53]

Mr. Rehnquist: We have no further questions.

(Testimony of Ernest H. Otto.)

Cross-Examination

By Mr. Burch:

Q. Mr. Otto, you stated, I think, you first came to Arizona on cotton picking business, is that correct? A. That is right.

Q. That was in 1953? A. Yes.

Q. Did you pick out in the Harqua Hala Valley at that time? A. No.

Q. Your first experience out there was in 1954, when you started picking?

A. That is right.

Q. What time of the year did you do that?

A. I believe it was in October.

Q. And you had been there, I assume, prior to October, sometime, in 1954? A. Yes.

Q. Do you recall when you first went out there in 1954?

A. It was a little before we started picking.

Q. Would it have been in September?

A. It could have been. I wouldn't swear to it.

Q. There is only one road out into the Harqua Hala country, isn't there, from Buckeye? [54]

A. No.

Q. How many roads from Buckeye?

A. Two.

Q. How did you go out that first time?

A. I took the road to the left.

Q. That is the road that goes past the Shepard property?

(Testimony of Ernest H. Otto.)

A. No. It just—the Shepard property, the one corner of it bumps into the road that you go by.

Q. Is that where the wells are? A. No.

Q. That is some other corner from there?

A. That is the furthest corner from the well.

Q. Who did you do business with out there in your first effort to get cotton picking business?

A. Gordon Cameron and Ed Swindle.

Q. Where are their farms in relation to the farms that Cal-Nine finally purchased from Shepard?

A. Gordon Cameron adjoined the Shepard place on the west, and Centennial Farms is, I would say, three or three and a half miles from there.

Q. Whose cotton did you pick first, if you remember?

A. Gordon Cameron's, on the place he had rented, not his home place.

Q. Did you pick any on his home place?

A. Yes. [55]

Q. When did you do that?

A. I would say that was in November.

Q. You had been over to his home place, then, I take it prior to that time? You were familiar with it?

A. One time we was at the house, yes.

Q. Had you had occasion to see the Shepard property as you drove by?

A. From the road, yes.

Q. Had you ever made any inspection of it at all? A. No.

(Testimony of Ernest H. Otto.)

Q. Were you at that time interested in purchasing it?

A. No, I didn't know it was for sale when I first came out there.

Q. You had occasion on a number of times to observe the Shepard property, though, as you picked cotton out there, you saw the crop growing?

A. No. When I was out there the crop was not growing any more.

Q. It was complete, is that right?

A. That is right.

Q. That was in September and October of 1954?

A. I would say in October, yes. In other words, they weren't irrigating any more at that time.

Q. Did you talk to Mr. Shepard about picking his crop that year? [56] A. No.

Q. When you were through with the cotton picking, did you go back then to California?

A. Yes.

Q. At that time, had you any notion of buying the Shepard property?

A. When I finished picking cotton, we already had it bought.

Q. When did you first get the idea of buying the Shepard property?

A. I would say it was some time in October, the later part of October.

Q. How did that come about?

A. Gordon Cameron and Ed Swindle, I got to know them pretty well, because I was working with them, and they told me, Why didn't I try to buy

(Testimony of Ernest H. Otto.)

a ranch over here. They said, "We need some more neighbors out here. We want to make this valley boom out here."

That is when I first got interested. They were telling me the Shepard place was for sale at that time.

Q. It was not due to any solicitation from Mr. Shepard that you bought the property?

A. No.

Q. Was that the first you talked to Cameron and Swindle about the property, and what it would do? [57]

A. Yes.

Q. And was that when Mr. Shepard told you about the farm being a good one, and that it had sufficient water, in his estimation? A. Yes.

Q. And you had also gotten approximately the same information, apparently, from Mr. Swindle, is that right? A. Yes.

Q. Had you talked to anybody else about the property before you went to see Mr. Shepard?

A. We talked to a real estate man, yes.

Q. Had you talked to Woody, Mr. Cameron's foreman? A. Yes.

Q. Had you asked him how much water it would produce? A. Yes.

Q. He told you about 70 to 75 tubes, isn't that correct? A. Yes.

Q. You stated that is about the same thing Mr. Shepard told you, isn't that correct? A. Yes.

(Testimony of Ernest H. Otto.)

Q. You said you saw Mr. Shepard some time in October of 1954, and talked about the land. I think you stated just he and you had that conversation, is that right? A. That is right.

Q. At that time he told you he wanted $80,000 for it? [58] A. Yes.

Q. Did you attempt to make any inspection of the property?

A. It was some time after that I went over and looked at the property, yes.

Q. Did you go by yourself on that occasion?

A. Yes.

Q. Was anyone there when you arrived?

A. No.

Q. You looked over the entire property at that time, is that right?

A. I didn't walk over the whole thing, but I did walk around in the cotton, I think, there.

Q. You looked at the wells, the pump?

A. I looked at the pump. You couldn't see the well.

Q. You looked at the engine for the pump?

A. Yes.

Q. Did you see the tubes that were there?

A. Yes.

Q. All that was on the property and available for inspection? A. Yes.

Q. And you did inspect it? A. Yes.

Q. You finished picking some time in November of 1954, [59] is that right, or did you pick after that? A. No; we finished in January.

(Testimony of Ernest H. Otto.)

Q. Of 1955? A. Yes.

Q. Then some time in 1954 you left and went over to California; is that correct? A. Yes.

Q. And you saw Mr. Haas here who is your brother-in-law, is that right?

A. That is right.

Q. You told him you wanted to buy some property, and it was the Shepard property, is that correct?

A. I told him I sure would like to buy some land out there, because it looked like we could raise good cotton in that part of the country, and I told him there was a ranch for sale out in there. I heard there was a ranch for sale.

Q. At that time, had you had any business dealings with Mr. Shepard with regard to buying it, or just the one conversation?

A. Just the one conversation.

Q. And you and Mr. Haas decided at that time you would buy some Arizona property at that time, if it was possible to get it, is that right?

A. Yes.

Q. And you decided on this particular Shepard ranch, if [60] it was possible to buy it, is that right? A. Yes.

Q. Then you attempted to get some money from other friends, is that right? A. I didn't; no.

Q. Mr. Haas did? A. Mr. Haas did.

Q. And you accumulated $2,000.00, is that right?

A. Yes.

(Testimony of Ernest H. Otto.)

Q. The rest of the fellows promised to put up some additional money along with yours?

A. That is right.

Q. And you took Mr. Haas over in September?

A. Yes.

Q. And you took him out and showed him the property, is that right? A. Yes.

Q. And while you were there, you ran into Mr. Shepard? A. Yes.

Q. Just met him on the ground, no appointment? A. Yes.

Q. Did you have an opportunity to see the well in operation? A. Yes.

Q. He turned it on? [61] A. Yes.

Q. Was that at your request, or was he using it for some other purpose?

A. He needed it at the time for a cotton picker.

Q. So he wasn't demonstrating to you; he was using it for his farming business?

A. Not especially. We asked him to start it up, and he said he needed some water anyway, so he started it, and then used it.

Q. And he was coming up to turn it on, was that his statement?

A. I don't remember if he made that statement.

Q. He did turn it on, and it ran awhile, and you observed it? A. That is right.

Q. Did you ask him any other questions at the time that you haven't related here today?

A. Not that I can think of.

Q. You did ask him what the output of the well

(Testimony of Ernest H. Otto.)

was, and he said Jules Turner estimated it at 2,400, and he said he didn't think it would do over 2,200?

A. He said it was doing 2,200.

Q. And you said in your estimation it was only doing about 2,000, is that right? A. Yes. [62]

Q. So you didn't believe his statement of 2,200, did you?

A. I did in a way, because I wasn't used to those big pumps where I come from in California. Nobody had a pump that size.

Q. You have already stated you could estimate reasonably the output of one of these wells, that is true? A. Yes.

Q. And it was your estimate it was doing about 2,000? A. Yes.

Q. You didn't rely on his statement of 2,200? You were relying on your own experience?

A. I thought Elmer knew what he was talking about.

Q. But you were relying on your own experience, weren't you?

A. To a certain extent, yes.

Q. You had also gone around and made inquiry as to what the well would do, in the way of capacity? A. Yes.

Q. Did you rely on those statements made to you? A. Yes.

Q. So it was not only the statements you got from Mr. Shepard, but also your own experience, and the statements of other persons that led you to believe it would do 2,000 gallons?

(Testimony of Ernest H. Otto.)

A. Yes. [63]

Q. Mr. Haas was with you at the time?

A. Yes.

Q. He didn't know anything about wells, I take it, and was not a farmer?

A. No; he was no farmer.

Q. You say you saw the water, and it was very silty, and dirty, is that correct?

A. That is right.

Q. I think in response to the judge's question as to what would happen to bowls when they had sand in them, you said they would wear out. You knew that, didn't you?

A. Not at that time I didn't know. Where I come from they pump water, not sand.

Q. After observing this dirty condition of the water, did you attempt to do anything about it?

A. No.

Q. You had seen Gordon Cameron's pump, hadn't you? A. Not the pump.

Q. Did you ever talk with him; did you ever discuss with him the fact that he had the same type of well?

A. We talked about the wells; yes.

Q. And he had told you Elmer's well was similar to his own, didn't he? A. That is right. [64]

Q. Did he advise you that you had silty water?

A. No.

Q. After seeing the silty water in Shepard's well, did you go back and discuss the matter with Cameron again?

(Testimony of Ernest H. Otto.)

A. No; I didn't think it was sixty at the time. I thought it might have been a rust accumulation, or something like that, that would come from the pipe. All wells do that when they start up.

Q. Then you didn't make any inquiry at all about it, is that correct? A. No; I didn't.

Q. You say Mr. Shepard told you the well was gravel packed? A. That is right.

Q. Did you subsequently confirm that with Mr. Cameron, that he had put gravel in that well?

A. Not at that time, no.

Q. Did you afterward find out? A. Yes.

Q. And that was true, wasn't it?

A. No; that was not true. Gordon told me later, he said that well would have been all right, but Elmer never added any gravel to it, so that caused the thing to collapse.

Q. Mr. Cameron told you the well had collapsed, is that right? [65]

A. That is right; collapsed, or broke.

Q. Now, Mr. Shepard, at the time you were discussing this in September, said that the well was in good repair, is that right? A. Yes.

Q. Did he tell you when he had last repaired it?

A. Yes; he said when it was out of the hole they had repaired it.

Q. That was in the preceding July and August?

A. I forget. A short while before that.

Q. It hadn't been very long? A. No.

Q. I believe you said you never observed the well being operated after that one day when you

(Testimony of Ernest H. Otto.)

and Mr. Haas attended at the well site in September. I guess you never saw the well operated again until the following April, is that right?

A. That is right.

Q. Do you know whether or not it was ever run during that period of time? A. No.

Q. You were there until January in that area?

A. No; not all the time. I was back and forth with the cotton pickers.

Q. You never observed it running?

A. No; I don't think Elmer would have started it up for [66] that reason during that time of the year.

Q. As near as you know, that well was in the same condition in April, when you started it, as it was in November when you saw it, is that correct?

A. I would imagine, yes.

Q. Is it your testimony now that, apparently, it was producing the same amount of water in April that it was in November? A. Yes.

Q. Now, this down spout or hood, that was welded on the discharge pipe, is that correct?

A. Yes.

Q. That was perfectly plain to see, is that right?

A. Yes.

Q. As a matter of fact, that directed the water into the weir box, didn't it? A. Yes.

Q. How big was this flange that was in the pipe?

A. I would say 2 inches wide and 4 or 5 inches long.

Q. How big was the pipe itself?

(Testimony of Ernest H. Otto.)

A. 12 inches.

Q. Actually, it was only a small obstruction there, wasn't it? A. It was plenty big.

Q. And it held the water back, didn't it? [67]

A. That is right.

Q. So you wouldn't get as much water coming out if it hadn't been there?

A. No; it just made it look like it was coming out with more force, as far as I knew.

Q. Did you make any inquiry as to the purpose of the flange? A. After I bought the place.

Q. What did you find out?

A. I asked Gordon Cameron about it, and he kept laughing about it.

Q. Did he tell you what it was for?

A. He come out and told me what it was for. He said, "You're not that dumb. You can figure why Elmer had that put in there."

Q. You were present at Mr. Cameron's deposition, weren't you? A. Yes.

Q. Did he make that same statement there?

A. I don't know. I don't remember.

Q. Did you leave the flange in?

A. It was in for a while; yes.

Q. For how long?

A. I would say a couple of months.

Q. As a matter of fact, it was a good device for giving [68] additional cooling to the gearhead. wasn't it? A. No.

Q. It was not?

(Testimony of Ernest H. Otto.)

A. Absolutely not. They got a device on there for that.

Q. Pardon?

A. They got a device on there for that.

Q. That is a butterfly valve, is it, you are speaking of? A. That is right.

Q. Isn't it a fact on that particular machine if you put the butterfly valve over two notches, it would force water over the head?

A. How was that?

Q. If you put the butterfly valve over two notches on your particular pump, that it would force water up out of the top? It gave too much back pressure?

A. If you open the valve. If you didn't open the valve, it wouldn't force it any place.

Q. As a matter of fact, you didn't get very much back pressure with the butterfly valve up one notch?

A. We used the butterfly when we had water up on top, yes.

Q. So you did use this flange for a period of a couple of months?

A. We didn't use it. I just left it there. [69]

Q. Did you finally take it off? A. Yes.

Q. Who did you have do that for you?

A. A fellow by the name of Ed Dysart that was working for me.

Q. Who put out your tubes in April when you started your pre-irrigation? A. Woody.

Q. He was Cameron's foreman? A. Yes.

Q. How many tubes did you lay out?

(Testimony of Ernest H. Otto.)

A. We laid out 70 tubes, and we went along and started all these tubes.

Q. You didn't start with 55 tubes, is that correct?

A. Like I say, we laid out 70 tubes. We started on one side, we started all the tubes, and when we got through the first ones had stopped. We found out you couldn't run that many, so we ended up with 55 running.

Q. You started out with 70 tubes?

A. We laid out 70 tubes. We didn't start them.

Q. You didn't run any water through all 70?

A. We had 55 tubes running. That is how many.

Q. Then you had 15 tubes left over you didn't use? A. Yes.

Q. Isn't it a fact Woody put out 72 tubes and started [70] them all running? A. No.

Q. That is not true? A. No, absolutely.

Q. You were there all the time?

A. That is right.

Q. Now, I think you stated that you and Mr. Haas, when you came over in November, executed this Option Agreement? A. Yes.

Q. That was the entire agreement between you and Mr. Shepard, wasn't it?

A. No. That we had talked about, yes.

Q. You put everything down that was agreed to, what he was going to sell for, and the price you were going to pay? A. Yes.

Q. You state you assigned this to the Cal-Nine Corporation, you and Mr. Haas? A. Yes.

Q. That corporation was not in existence at the

(Testimony of Ernest H. Otto.)

time we are talking about? A. No.

Q. As a matter of fact, you and Mr. Haas didn't know at the time what kind of organization you were going to have, until you went back to California and he discussed it with a lawyer, isn't that right? [71]

A. We had discussed it before we come over here.

Q. You hadn't made up your minds what your operation would be?

A. After we bought the ranch, yes.

Q. Isn't it a fact you went back and discussed it with your lawyer in California, and at that time he advised you to form a corporation?

A. No, he told us that before.

Q. And then when you went back you had a lawyer form a corporation? A. That is right.

Q. And you assigned your option right to that corporation? A. I don't remember.

Q. Did you execute an assignment to the corporation?

A. I imagine we did. We did everything according to the way it was supposed to have been done.

Q. Do you know?

A. No, I don't. The lawyer was handling it for us.

Q. Did you bring over your corporate records?

A. How was that?

Q. Do you have your corporate records here now?

A. No.

Q. Have you sent for them? A. Yes. [72]

Q. Do you recall whether or not you and Mr. Haas received any consideration for this assignment after it was made?

(Testimony of Ernest H. Otto.)

A. We didn't get anything for it, no.

Q. I think you said after your talk with Mr. Shepard you had a second talk with him, then, in Buckeye, is that correct?

A. Yes, I talked to him in Buckeye.

Q. And you wanted some additional cotton allotment, or the deal was off, is that right?

A. When are you referring to?

Q. This talk in the Buckeye motel now.

A. No, not at that time. We just wanted some more cotton allotment. We didn't have the place bought yet then.

Q. You hadn't had the place bought?

A. No.

Q. And Mr. Shepard finally gave you some more cotton allotment, is that correct?

A. Not at that time, no.

Q. When did he do that?

A. Mr. Shepard told us there was 120 acres of cotton allotment on that ranch out there, and he says, "You guys will have at least 100 acres of cotton out here, because they are figuring on a 15% cut."

In other words, the 15%, he should have left us a little better than 100 acres of cotton allotment, so we went [73] through with the deal. And when we got finally our papers from this office, there was 70 some acres allotted to this ranch, not 100, so at that time we went to Mr. Shepard and said we didn't see how we could make payments on a ranch of that size with just 70 acres of cotton allotment.

(Testimony of Ernest H. Otto.)

So we told him we would rather lose the sale than take it like that. So he gave us a few acres more.

Q. So you made a new deal on this?

A. No. He just agreed to give us a few more acres of cotton.

Q. To save the deal? A. That is right.

Q. And the additional was this additional cotton acreage, is that right? A. Yes.

Q. You told him you would just as soon lose it as have that?

A. We told him we couldn't make the payments.

Q. So actually all you were entitled to on that land was 70 acres of cotton?

A. That's one way of looking at it, but we were promised better than 100.

Q. He was making that just as an estimate, wasn't he?

A. In a way it was just an estimate, but he led us to believe it was better than 100 acres. I don't think Elmer [74] meant it that way at all, but that is the way it turned out.

Q. As a matter of fact, you went down and got some additional acres from those people on a hardship basis, is that right? A. That is right.

Q. How much was that?

A. I forget, but we ended up with 105 acres of cotton.

Q. And you state when you started pumping, the well was pumping sufficient water, whatever the gallonage, to take care of that 105 acres, is that right?

A. If it held up.

(Testimony of Ernest H. Otto.)

Q. And that you noticed a gradual decrease in the production of the well? A. That is right.

Q. Mr. Shepard never made any guarantee to you that that well would continue in production, did he?

A. I kind of took it as a guarantee, what he told us.

Q. He told you what the future production of that well would be?

A. No, he said you will have plenty of water here to raise 220 acres of cotton.

Q. When the well gradually decreased, did you have anybody come out and inspect it? A. No.

Q. You said you talked to Mr. Cameron. Did he give you [75] any opinion as to what was happening to cause this gradual decrease in water?

A. Yes.

Q. Did he tell you the bowls were wearing out?

A. No.

Q. Nobody told you that? A. No.

Q. You didn't make any effort to find out if that was the matter? A. No.

Q. But you did talk to Mr. Cameron about getting some additional water if your well failed?

A. Yes.

Q. And that was somewhere in June or July?

A. Yes.

Q. He stated, he told you you would have to run the water out across the desert, and not across his land? A. Yes.

Q. You have stated you had a good crop in July?

(Testimony of Ernest H. Otto.)

A. Yes, the first of July.

Q. You had plenty of water, is that right?

A. Yes, plenty of water yet.

Q. That was approximately 9 months after you entered into this agreement with Mr. Shepard?

A. I don't know. [76]

Q. And you had been running the pump continuously for approximately a month at that time?

A. No. It was better than a month.

Q. About two months?

A. A month and a half, I would say.

Q. You never shut it off unless some mechanical trouble stopped you?

A. From that point on, yes.

Q. You spoke about the fact that these rains came. They came at the end of July, didn't they?

A. I don't remember.

Q. And lasted for approximately three weeks?

A. I think two or three weeks, yes.

Q. They got so bad at one time you were unable to get out on your property?

A. Yes, we couldn't cross the Centennial Wash. It was running.

Q. Your furrows were flattened out, weren't they? A. Yes.

Q. To the extent you started to furrow the place to get more water? A. Yes.

Q. You furrowed that? A. Yes.

Q. And you didn't put any more water on? [77]

A. Yes.

(Testimony of Ernest H. Otto.)

Q. And you decided not to use Gordon Cameron's? A. That is right.

Q. And your decision was you felt it would injure the crop? A. At that time, yes.

Q. And it wasn't because you couldn't get the water? A. No.

Q. You decided more water would damage the crop? A. At that time, yes.

Q. Did you ever try to put any more water on it then? A. When?

Q. After that time that you refurrowed?

A. Oh, yes.

Q. Where did you get that water from?

A. I had my pump running.

Q. And did that additional water damage the crop? A. From my pump?

Q. Yes. A. I wouldn't say so, no.

Q. You stated Mr. Cameron said you shouldn't spend 5, 6, or 7 thousand dollars working to repair the well, is that right? A. That is right.

Q. Did he advise you if you put new bowls and new impeller [78] blades in, you would bring it back up to normal?

A. No. He said it was absolutely useless to repair that well.

Q. He never looked in it to see?

A. He was in the year before.

Q. At that time they had deepened the well?

A. Yes.

Q. That was in 1953 that Mr. Cameron was in the well, wasn't it? A. I don't remember.

(Testimony of Ernest H. Otto.)

Q. It had been a year previous?

A. I think it was just before Elmer raised his last crop, whenever that was.

Q. And Mr. Shepard had raised, then, a full crop of cotton after Mr. Cameron had deepened the well?

A. That is right.

Q. And had also put in a new pump, new bowls?

A. That is what he told us.

Q. So Mr. Cameron had had no opportunity to investigate the well for a period of over a year?

A. I guess not.

The Court: We will suspend until two o'clock.

(The noon recess was taken.) [79]

Thursday, May 17, 1956, 2:00 P.M.

Cross-Examination
(Continued)

Mr. Burch: Will you read the last question and answer?

(The record was read as requested.)

Q. (By Mr. Burch): Mr. Otto, when was it that you had the pump pulled, I don't know that you ever told us, on the property?

A. I believe it was in November.

Q. That was approximately, then, one year after the purchase of the property, is that correct?

A. That is right.

Q. And to your knowledge, then, while you were

(Testimony of Ernest H. Otto.)

in possession during that period of time, no one examined the well, or did any repairs to anything down in the well, is that correct? A. No. [80]

Q. What is the situation there?

A. I mean, that is what it was.

Q. That is correct? A. Yes.

Q. After the pump was pulled, did you have any well expert or any examination made by any person as to the condition of the well, other than what you have already related in regard to the string being put in the well? A. Just Gordon Cameron.

Q. And what did Mr. Cameron do?

A. He didn't do anything.

Q. He didn't make any inspection of the well either, then, I take it, is that correct?

A. Yes, he was around there all the time.

Q. Did he make any inspection of the well at your request?

A. Well, I know he was there looking at it, and also when he was pulling the casing out, we could observe there wasn't any gravel around the casing at all.

Q. Did he tell you that, or did you make that observation yourself?

A. He said it, and I made the observation, too.

Q. How were you able to observe whether or not there was gravel around the casing?

A. There was just a big opening around the casing. You [81] could get the casing and just swing it around, I imagine, for 100 feet down, there was nothing around it.

(Testimony of Ernest H. Otto.)

Q. That was for the first 100 feet, then?

A. I am just estimating now, because you could just get the big casing and swing it around.

Q. What was down below you don't know, then, is that correct? A. No.

Q. This new well you drilled, it was not the same size well as the old one, was it? A. Yes.

Q. It was? A. Yes.

Q. Same width, same bore, everything?

A. When they drilled it, yes.

Q. Same depth? A. No, it was deeper.

Q. It was much deeper, wasn't it?

A. It was a couple hundred feet deeper.

Q. And you pay for wells by the number of feet of depth you drill, isn't that correc

A. That is right.

Q. So this was a more expensive well than the other one?

A. No, I believe Gordon Cameron told me it would come to about the same thing. We put in smaller casing at the [82] bottom, but we had to add more gravel, so the cost would have been the same.

Q. You put in more casing in this new well than the old well, about 200 feet more? A. Yes.

Q. And you also made it a different type in that the perforations of the casing were placed differently, isn't that true? A. Yes.

Q. And you went below the silty area in that particular location, is that right? A. Yes.

Q. And you had larger casing up toward the top than in the old well? A. No.

(Testimony of Ernest H. Otto.)

Q. The same? A. The same thing.

Q. And you had gravel put in? A. Yes.

Q. You say there was no gravel in the old well?

A. We couldn't observe any gravel at all.

Q. So it was different in that respect, is that correct? A. I imagine.

Q. How much gravel did you put in?

A. 351 ton. [83]

Q. And you had the bowls pulled from the old well? A. Yes.

Q. They were worn out, weren't they?

A. Yes.

Q. Didn't Mr. Cameron advise you that was one of the reasons it wouldn't pump any water, because the bowls needed repairing?

A. I don't believe Mr. Cameron said anything about the bowls.

Q. What was your own observation? Were the bowls in any condition to pump water?

A. I wouldn't say so.

Q. That was one reason, then, it wouldn't pump water, the bowls needed repairing?

A. That was one reason.

Q. It might have been the reason, might it not?

A. I don't believe it would be all the reason.

Q. What was the water depth in the old well?

A. At what time?

Q. When you were pumping.

A. I don't know.

Q. You never made any effort to determine?

A. Elmer Shepard and Gordon Cameron told me

(Testimony of Ernest H. Otto.)

it was pulling down to the bowls, and the bowls were set at 380 feet, but I never measured them. You couldn't with the pump being [84] in there.

Q. So you don't know what happened to the water supply during the year you had possession of the property. A. I didn't follow?

Q. You don't know where the water level was on the property, is that correct? A. No.

Q. You said there was a third well on the property, that is correct, isn't it? A. Yes.

Q. Approximately 120 feet from the second well or old well? A. About 140 feet.

Q. You say that was covered?

A. That is right.

Q. At the time the floods came out there, you had your engine running constantly, is that right?

A. That is right.

Q. Isn't it true that the flood water got so high it came around the first well, and then the flood water poured into it? A. No, that isn't true.

Q. You told Mr. Thiebeau and Travis Shahan, and Mr. Brooks you had been ruined, isn't that true, when they inquired as to what the flood damage [85] was?

A. I don't know the men. I never heard the names before.

Q. You made no statement like that, to your knowledge? A. That is correct.

Q. You stated you refurrowed your cotton crop after the rains and flood in that area?

A. That is right.

(Testimony of Ernest H. Otto.)

Q. As a matter of fact, that flood damaged your crop heavily, didn't it? A. No.

Q. Isn't it true that after your well had been running for a period of a month or two, and particularly through that flood season, that your pump sank about 6 inches at that time?

A. That is right, gradually started to sink.

Q. And even so, you made no effort to cut it off, is that true?

A. No. Gordon told me just keep it running as long as it will run.

Q. I think you stated you felt $80,000 was the value of the land, if it was in the condition Mr. Shepard represented it to be?

Mr. Rehnquist: We object as being an incorrect statement of the testimony.

Q. (By Mr. Burch): What was your statement with regard to the value of the land? Will you repeat it? [86]

Mr. Rehnquist: We object to that on the grounds there is no evidence, as we recall, that Mr. Otto has committed himself on the value of the land.

The Court: He may have. I don't remember.

Q. (By Mr. Burch): Mr. Otto, I think you referred to a conversation which took place between you, Mr. Shepard, Mr. Haas and a man named Woody, when you were together at the motel in Buckeye. Do you recall the testimony in that respect? A. Yes.

Q. Isn't it true that in the negotiations there you agreed, as an additional consideration for Mr. Shep-

(Testimony of Ernest H. Otto.)

ard selling the property, to put up a house and a half mile of concrete ditch on the premises?

A. No, absolutely not.

Q. You do not recall a conversation of that nature? A. No.

Q. Did you construct a house on the premises?

A. No.

Q. Did you construct a half mile of concrete ditch? A. Yes.

Q. When was that?

A. I would say that was the first part of this year.

Q. Has that been paid for, incidentally?

A. No. [87]

Q. I think you stated you have never seen the Gordon Cameron's well in operation prior to your purchase of the Shepard property, is that correct?

A. That is correct.

Q. Isn't it true in your investigation of this property you saw Woody at Gordon Cameron's well and watched him operate that pump on a number of occasions? A. No.

Q. Isn't it true you inquired of him as to the condition of the well on the Shepard property, and didn't Woody tell you that the silt condition was the only objection to the well?

Mr. Rehnquist: We object to that on the grounds it is duplicitous.

The Court: It is what?

Mr. Rehnquist: Your Honor, it is duplicitous.

(Testimony of Ernest H. Otto.)

The Court: All right. Divide it up.

Q. (By Mr. Burch): Did Woody tell you prior to the purchase of the Shepard property that there was a silt condition in Elmer Shepard's well?

A. No.

Q. Isn't it true he told you that would be the only problem you would have with that well, was the bowls wearing out? A. No. [88]

Q. Isn't it true you saw Gordon Cameron's well in operation 15 or 20 times during the cotton picking season of 1954? A. No.

Q. Isn't it true you got water there for your cotton picking machines?

A. Yes, we got water out of a tank.

Q. And they had to run the pump to get the water, didn't they? A. Yes.

Q. You observed that? A. No.

Q. I think you stated Woody first started your well and pump for you when you first took over the operation of the property?

A. He was helping me.

Q. Isn't it true you set out 100 pipes?

A. Absolutely not.

Q. And you set out 72 two-inch pipes to start out?

A. I explained we set out 70, and started 55.

Q. Isn't it true you ran water through 72 pipes?

A. We started at the beginning of the ditch to start all these pipes, and we got to the end, to the 70 pipes, and they were all running when we started them. When we got back to the head of the ditch, they were stopping.

(Testimony of Ernest H. Otto.)

Q. Wouldn't they all run, all 72? [89]

A. Absolutely not.

Q. Isn't it a fact that you told him at that time you were pleased with the property? A. No.

Q. Isn't it true two or three weeks later when he came on the property you made the same statement to him? A. No, I don't recall.

Q. Isn't it true also that in your investigation of this property prior to purchase, you talked to the Arizona Engine and Pump people about the well?

A. Before I purchased this property?

Q. Yes. A. No.

Q. When did you talk with them about it?

A. About what?

Q. About the well.

A. Well, I can't recall the date, but it was sometime while we were farming, the man came out from Arizona Engine and Pump Company and inquired of me if I wanted to have their man come out on regular intervals and check my motor for me, and I said yes.

Q. Didn't Woody tell you prior to the time you purchased the property that Gordon Cameron's well and Elmer's were about in the same condition?

A. I can't recall he told me that. [90]

Q. You were on the Shepard property on two or three occasions prior to the time you took Mr. Haas out there, were you not?

A. No. Two times, I would say, yes.

Q. You were not prevented in any manner from inspecting the property or the machinery and the

(Testimony of Ernest H. Otto.)

equipment on it, were you? A. No.

Q. And at the time that you and Mr. Haas entered into the Option Agreement with Mr. Shepard, you were satisfied with your own investigation of the property, were you not? A. Yes.

Q. And you had relied on no one's statement of fact except your own investigation of what you could determine was true?

A. No, I relied upon all the information I got from my neighbors, and everyone else.

Q. From the neighbors?

A. And Elmer Shepard.

Q. Isn't it true when you had your conversation with Mr. Shepard in regard to the capacity of the well, you thought he was stretching it when he told you that there was 2200 gallons it would produce?

A. I had an estimate close to 2000, but I figured he knew what he was talking about. He owned the well. [91]

Q. My question was, you thought he was stretching it a little at that time, didn't you? A. Yes.

Q. I think you have stated you were unable to make any estimate as to the exact amount of gallonage it was pumping, is that correct?

A. You couldn't guess exact, I don't think.

Q. At the time you took over in April, did it appear to be pumping any less than, or any more than it had when you looked at in November, 1954?

A. It looked like it was pumping the same amount at that time.

Q. It looked like it was pumping the same amount? A. Yes.

(Testimony of Ernest H. Otto.)

Q. It was only after you did operate it, after you had operated it for awhile that the capacity of the production of the well seemed to diminish, is that correct? A. That is right.

Q. That was not a sudden diminishing, but a gradual reduction in capacity, wasn't it?

A. Yes.

Q. And that continued over a number of months?

A. Yes.

Q. As that condition continued, you kept using the well and made no effort to repair it, is that [92] right? A. Yes.

Q. Nor did you make any effort to determine the cause of that diminishing production, what the cause was? A. Yes, through Gordon Cameron I did.

Q. Through Gordon Cameron you did. And that was really by the process of asking Gordon Cameron what his opinion of the cause was, is that correct?

A. That is right.

Q. And you made no effort to ascertain by any investigation of the well itself? A. No.

Q. I think I asked you earlier this morning whether or not you had made an assignment, you and Mr. Haas, of your interest in the option to the Cal-Nine Corporation.

Have you had your memory refreshed in that respect? A. Yes.

Q. And did you make an assignment?

A. Yes.

Q. And when was that assignment made?

(Testimony of Ernest H. Otto.)

A. This one?

Q. The one today, is that correct?

A. That is right.

Q. And that is the first such assignment that has ever been made, isn't that true?

A. We didn't have anything on paper. It was just verbal. [93]

Q. The Cal-Nine Corporation has never made any acceptance of that assignment, or known anything about it, as a corporation, isn't that true?

A. No.

Q. You mean by No that Cal-Nine does not know of this assignment officially yet, is that your answer?

A. Outside of the vice president.

Q. Is that assignment here in the courtroom at this particular time?

Mr. Rehnquist: Here it is. (Handing to counsel.) We will be glad to offer that now.

Mr. Burch: I believe that is all.

Redirect Examination

Mr. Rehnquist: May we have this marked for identification?

The Clerk: Plaintiff's Exhibit 8 for identification.

(Said Assignment was marked as Plaintiff's Exhibit 8 for identification.)

By Mr. Rehnquist:

Q. Handing you Plaintiff's Exhibit 8 for identification, is this the assignment about which you were just cross-examined? A. Yes.

(Testimony of Ernest H. Otto.)

Q. And is that your signature? A. Yes.

Mr. Rehnquist: I offer it in evidence.

Mr. Burch: If the Court please, we are going to object [94] to any assignment. At the beginning of the trial this morning we were in receipt of the trial memorandum prepared by counsel for the Plaintiff, and we would like to submit herewith a Memorandum of authorities for the benefit of the Court with respect to this particular point that is coming up.

I note in the Memorandum counsel furnished us, there was no Arizona case in point. We do have one which says a cause of action for fraud or deceit is a personal thing that cannot be assigned to a corporation, and particularly which we feel was not in existence at the time of the fraud or deceit complained of.

We cite other authorities along that line. We feel there is no basis for this Assignment today to be put into evidence. It certainly can't assign to that corporation something that is in the way of a right of action, that it did not have at the commencement of this action, and it is attempting to assign to them a cause of action arising prior to its existence.

I believe, with the authorities, the Court will sustain us in each of these points.

The Court: All right, it may be received subject to your objection.

The Clerk: Plaintiff's Exhibit 8 in evidence.

(Said Assignment was received in evidence and marked as Plaintiff's Exhibit 8.) [95]

(Testimony of Ernest H. Otto.)

Q. (By Mr. Rehnquist): It was brought forth from you on cross-examination, Mr. Otto, that at the time the pump was pulled, the casing could be swung a distance of 100 feet.

Did you mean by that a distance of 100 feet in diameter, or 100 feet down the well?

A. Down the well.

Q. So that your view down the well was just about 100 feet, is that correct?

A. Yes, I would say that.

Q. And it was in that distance that you could see no gravel? A. That is right.

Q. When you turned the pump on in April for pre-irrigation, how soon after that did you notice the decrease in the well?

A. Oh, I would say in a week or ten days we noticed it was pumping less water.

Q. Did you immediately notice that the output of the well was considerably less than 2,220 gallons a minute?

A. I knew it was less, yes, as soon as we started irrigating.

Q. How soon after he turned the pump on did you start irrigating?

A. I started irrigating immediately after he turned the pump on. [96]

Q. Do you know where your new well is drawing from?

A. The pump company checked that, and they said 200 feet.

(Testimony of Ernest H. Otto.)

Q. And how far is that new well from the well we have been discussing here?

A. About 125 feet.

Q. Do you know the cost of pulling the pump in a well to examine the well?

A. You mean just to pull it out and look at it and put it back in?

Q. Yes.

A. I would say it would be close to $1500.

Mr. Rehnquist: No further questions.

Recross-Examination

By Mr. Burch:

Q. There was one other matter, Mr. Otto. When you and Mr. Shepard and Mr. Haas, I believe it was, went to the lawyer's office in Buckeye, you went to Mr. Towner's office, is that correct?

A. That is right.

Q. And you dictated the Option Agreement to him at that time, is that correct?

A. I believe Elmer did.

Q. And Mr. Towner is the lawyer?

A. That is right.

Q. He is the statutory agent for your corporation, isn't [97] that true? A. That is right.

Mr. Burch: I believe that is all.

Mr. Rehnquist: No questions.

(Witness excused.)

ELMER F. SHEPARD

called by the Plaintiff as a witness for cross-examination, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Rehnquist:

Q. Will you state your full name, please?

A. Elmer Francis Shepard.

Q. You have already been sworn in this action, Mr. Shepard? A. Yes.

Q. You are one of the defendants?

A. Yes.

Q. Where do you live? A. Buckeye.

Q. How long have you lived there?

A. 37 years.

Q. Is that all your life? A. Yes.

Q. What is your occupation?

A. Farmer. [98]

Q. How long have you been a farmer?

A. Oh, for 13, 14 years.

Q. What has your experience in farming consisted of, with regard to crops? What crops have you farmed? A. Grain, cotton, alfalfa.

Q. How long have you farmed cotton?

A. About three years myself, and I have been associated with it about six years.

Q. Prior to January of 1955, did you own the north half of Township One North, Range Nine West? A. What section?

Q. I am sorry. A. Section 21?

Q. Section 21. A. Yes.

Q. And this is the land you sold to Cal-Nine

(Testimony of Elmer F. Shepard.)

Farms? A. That is right.

Q. When did you purchase that land, Mr. Shepard? A. I think it was probably in 1952.

Q. Was there any well on it then?

A. No, raw ground.

Q. Did you put one in? A. Yes.

Q. Do you remember about when you put that first well in? A. Sometime in September. [99]

Q. Of what year. A. 1952.

Q. What happened to that well?

A. Put in too light a casing, it collapsed when it was being perforated. The perforater hung and ripped a section out of it.

Q. Did it collapse from pumping too much sand?

A. I wouldn't know. It was injured by the perforator. We found it had too light a casing in it.

Q. Is it your statement that the pumping of sand had nothing to do with the collapse of that well?

Mr. Burch: I don't see what that has to do with this case. I don't see what probative value it has.

Mr. Rehnquist: It is genera y relevant, what you might expect out of a well. There is testimony this is 140 feet or 120 feet away from the well in question here.

The Court: Go ahead.

The Witness: Well, it might have had some bearing. I wouldn't know.

Q. (By Mr. Rehnquist): You don't think it had any bearing? A. It could have had.

Q. How long had this well been in operation when it collapsed? [100]

(Testimony of Elmer F. Shepard.)

A. Oh, probably hadn't been pumped over a week.

Q. Did anyone ever tell you what caused its collapse? A. No.

Q. Did Mr. Cameron ever make any statement to you? A. Never did.

Q. He didn't drill that first well, did he?

A. No.

Q. He never made any statement to you at the time of drilling the second well as to what caused the collapse of the first well?

A. I don't believe so.

Q. When was this second well drilled, to the best of your recollection?

A. Sometime in 1953, in April or May.

Q. How far away was this from the first well?

A. About 120 or 30 feet east.

Q. And this second well was the well on the property that was in operation at the time you sold the land to Cal-Nine?

A. Yes, it had been in operation two years.

Q. How many years did you farm the land you sold to Cal-Nine?

A. I had a lease deal the first year, and I farmed it one year prior to the sale myself.

Q. And who was the lease to the first year? [101]

A. It was a sharecrop deal, Claude Sanders.

Q. Wasn't it actually farmed by a partnership consisting of yourself and Claude Sanders?

A. I think it went into a partnership before it was over with.

(Testimony of Elmer F. Shepard.)

Q. What did you raise on that farm the first year? A. Cotton.

Q. And the second year?

A. The second year I farmed it and grew cotton.

Q. How many acres did you plant to cotton in 1953? A. 310.

Q. And how many bales an acre did you make?

A. I don't have those records. He has those records.

Q. What is your best recollection as to that?

A. Oh, about a bale, I imagine.

Q. Could it have been less than a bale?

A. It could have. I don't know.

Q. And how many acres did you plant to cotton in 1954? A. 211.

Q. How many bales to the acre did you make that year?

A. Approximately a bale and seven-tenths.

Q. Land with a good well on it is worth more than land with a bad well on it, isn't it, Mr. Shepard?

A. I imagine so.

Q. Would you say that the condition of the well on the [102] land is an important element in determining the value of the land out there?

A. I imagine it would be.

Q. Did you have a conversation with Mr. Ernest Otto and Henry Haas in the fall of 1954 about selling this property to them?

A. What about? On the ranch, or in town?

Q. If you will just answer the question we can pin it down. Did you have a conversation?

(Testimony of Elmer F. Shepard.)

A. Yes.

Q. Was this conversation out at the ranch?

A. The start of the conversation was at the ranch.

Q. What do you mean when you say the start of the conversation was there. Did you all drive back to town?

A. They asked me if it could be bought, and we was to meet in at the motel that evening and talk over the deal.

Q. So you had one conversation out at the ranch, and another one in at the motel?

A. A very short conversation at the ranch.

Q. And was anyone participating in the conversation besides you, Mr. Haas, and Mr. Otto?

A. No.

Q. Was anyone within earshot, so that he could have heard that conversation?

A. I don't know. One picking machine was close by. [103] I don't know whether the man heard the deal or not.

Q. Do you know who the man was operating that machine? A. Curtis Holloway.

Q. At that time, you knew both Mr. Otto and Mr. Haas were from California, didn't you?

A. I heard they were from California.

Q. And you knew they planned to raise cotton on this land at the time they bought it?

A. I didn't know.

Q. Did you suspect that they wanted to raise cotton on it?

A. I suspect, because cotton base is very valuable.

(Testimony of Elmer F. Shepard.)

Q. Did they discuss cotton with you?

A. They asked the number of acres that would probably go with the place, and I couldn't give them an accurate figure because every year the government sets the allotment.

Q. Did either Mr. Otto or Mr. Haas make any inquiry about the well on this property at this time?

A. One of them, I don't remember which, asked what I thought the well would throw, and I told them it had never been measured, that I couldn't say exactly. I told them a neighbor had made an estimate of 2,400 gallons, but I didn't think it would throw over 2,200 at the most.

Q. Who was that neighbor?

A. Jules Turner. [104]

Q. You stated it would throw 2,200 gallons, is that true?

A. I said I didn't know whether it would throw over 2,200. It was an approximate guess. I told them they could look at the tubes. It had never been measured.

Q. But that was your best guess at the time, 2,200 gallons? A. That is right.

Q. How did you arrive at that guess?

A. About the same way Otto arrived at the 2,000-gallon estimate, by observing the water come out at the end of the pipe.

Q. Did you also speak about the capacity of the well, in terms of tubes?

A. I told him he might be able to judge by the number of tubes it was running.

(Testimony of Elmer F. Shepard.)

Q. Did you tell him the number of tubes it was running? A. Yes.

Q. What number was that?

A. I told him we started with 70, and as the season progressed, we reduced to about 55.

Q. When you say "reduced to 55," you mean the well wouldn't run any more at that time?

A. No. We pumped the water up, in order to force the water to run fast, we ran trial runs.

Q. I presume you are referring to the 2-inch siphon [105] tubes when you made that statement?

A. Two-inch. Some of them had inch-and-a-half plugs. I don't know how many.

Q. Actually, there is quite a difference between an output that will run 70 two-inch tubes and 70 one-and-a-half-inch tubes?

A. The 70 were two-inch.

Q. That is what you were talking about in terms of the well running 70 tubes?

A. That is right.

Q. You meant two-inch tubes? A. Yes.

Q. Did you regard the well and equipment to be in good condition at this time?

A. It should have been. I had it checked every two weeks.

Q. And you did regard it as being in good condition at that time? A. Yes.

Q. Did you tell Mr. Otto and Mr. Haas it was?

A. They asked what condition it was, and I told them exactly what I am telling you, that it had been checked every two weeks during the pumping season.

(Testimony of Elmer F. Shepard.)

Q. Did you tell them anything more about things that had gone wrong with the well? [106]

Mr. Burch: If the Court please, I think that assumes a fact not in evidence.

The Court: I didn't know anything had gone wrong with it.

The Witness: I don't remember whether they even asked, or not. They seemed to have all the information that they needed when they approached me for the purchase of the place, they seemed to have all that information.

Q. (By Mr. Rehnquist): Did you tell them anything about having the pump pulled previously?

A. If they asked me, I did. I don't remember.

Q. Did you tell them anything about Mr. Cameron going back into the well?

A. Yes; they knew it had been deepened a year before.

Q. But you don't remember whether or not you told them anything about the pump ever being pulled?

A. I can't recall whether I did or not.

Q. If they had asked you, would you have told them?

A. I would have told them, because it was on the records of the tract. They could have found it if they so desired.

Q. Did you have any reason to believe that the output of the well was decreasing at this time?

A. At what time?

Q. At the time of this conversation in [107] No-

(Testimony of Elmer F. Shepard.)

vember. A. That it would decrease, no.

Q. What exactly had you had done to the pump and equipment from the time that this second well was drilled, Mr. Shepard, other than routine checks?

A. Well, the first time we thought it was something wrong with the engine, and had the engine checked.

The engine people said it was in the pump, so we pulled the pump, and they gave that a good check and put it back in the hole, and it was doing the same thing, so then we called out the head mechanic, and he found it was the gas pressure, the natural gas engine and the distributor mag head, and that was repaired, and it went right on. That was all there was to it.

Q. So there was nothing wrong with the pump that time?

A. They sent it in, they always take it in to check it. I don't know exactly what they did do to it. They might have made some minor repairs.

Q. It would just be minor repairs, is that correct? A. I think so.

Q. Was the pump pulled on any other occasion from May, 1953, to November, 1954?

A. It was pulled in August.

Q. What was the reason for pulling it then?

A. Broke an oil shafting.

Q. In the pump? [108] A. Yes.

Q. And what was done to it?

A. It was repaired.

Q. Anything wrong with the bowls at that time?

(Testimony of Elmer F. Shepard.)

A. I sent them in and had them checked. Whatever had to be done, it was done. I wasn't in there when it was repaired.

Q. Any other occasions on which you had trouble?

A. I think that was about the size of it.

Q. You are sure there was not any more serious trouble on that on any other occasions?

A. On the equipment?

Q. On the equipment.

A. Not that I recall, not that I can think of.

Q. Did you tell either Mr. Otto or Mr. Haas in November that there was plenty of water on that land for 2,200 acres of cotton? A. No.

Q. Did you believe that there was?

A. I had every reason to believe that there was. We had just finished a 211 acre crop, at a bale and seven-tenths.

Q. Is that considered a good output of cotton, a good number of bales per acre?

A. I think so.

Q. How does it compare with the standard of the neighbors [109] around there, if you know?

A. That was either high in that area, or next to high on planted cotton.

Q. Were you served with a subpoena in this action, Mr. Shepard? A. Yes.

Q. And did I request you to bring certain documents with you? A. That is right.

Q. Do you have those? A. Yes.

Q. Are these the records that you brought with you? A. Part of them.

(Testimony of Elmer F. Shepard.)

Q. Are they all the records pertaining to State Tractor & Equipment Company's services to the equipment? A. I think so.

Mr. Rehnquist: Could we have these marked for identification?

The Clerk: Plaintiff's Exhibit 9 for identification.

(Said Statements were marked as Plaintiff's Exhibit 9 for identification.)

Q. (By Mr. Rehnquist): On this first sheet, September 2nd, 1954, does that simply represent the routine check?

A. "Check and set valves, plugs, timing, mag."

Q. And the total was $12.50? [110]

A. Twelve dollars and a half.

Q. This second sheet, August 3rd, 1954, that is the time you spoke of when you had the pump pulled?

A. Yes; I think that was when we pulled it.

Q. If it said on this sheet, "pull customer pump and repair bowls as required," that would be a correct statement of the work done?

A. That is right. It was sent in, and anything that needed to be fixed, they fixed.

Q. Are you acquainted with Mr. Vern Tower?

A. Yes.

Q. Is he the man in charge of State Tractor's working on your place this time?

A. Vern is a salesman.

Q. Did he participate in this repair work?

(Testimony of Elmer F. Shepard.)

A. No; not in the repair. That was done in the shop.

Q. Did he come out to your land on behalf of State Tractor and confer with you about your pump in August of 1954?

A. I don't know whether he did or not. That is so far back I couldn't remember who was there.

Q. Was he the man that generally came out to see you for State Tractor?

A. He was the general representative for that area.

Q. You can't think of anyone else who might come out [111] for State Tractor at that time?

A. Yes; I can. The people who pulled the pump.

Q. Who would have been working under Mr. Tower? A. Out of Arizona Engine & Pump.

Q. Was Arizona Engine & Pump organized at this time?

A. It was State Tractor at that time.

Q. So the bowls were repaired in August, August 3rd of 1954?

A. That is right. Anytime you pull a pump out of a hole, if there is the least thing wrong with it, it should be repaired.

Q. What had been the output of the well immediately prior to pulling this pump?

A. Immediately prior?

Q. Yes.

A. I imagine it was pumping the same up until the time the tubing broke.

Q. And what do you mean by "the same"?

(Testimony of Elmer F. Shepard.)

A. The same gallonage it had been pumping had it reduced down to 55 tubes.

Q. But then no part of the reason for having this repair work done was a decline in the output of the well?

A. No; the tubing broke and froze the shafting.

Q. Did you confer with Mr. Tower at this time about what sort of steps should be taken to repair the pump? [112]

A. No; because Mr. Tower wouldn't know anything more about it than I did, until it was pulled out of the hole.

Q. Did you confer with him after it was pulled out of the hole?

A. I don't remember. I don't think so.

Q. If you had conferred with him, you would have followed his advice, I take it?

A. Not necessarily.

Q. You might not have followed his advice on this occasion?

A. There are many people with State Tractor whose advice I would have followed more than Vern Tower, because he was a salesman.

Q. Did Mr. Tower tell you at the time you should have the bowls replaced? A. I don't think so.

Q. You probably would have remembered, if he had?

A. I don't know as I would have. He was always trying to sell something or other. He was a salesman.

Q. You don't remember his telling you you should have the bowls replaced at this time?

(Testimony of Elmer F. Shepard.)

A. No; I don't.

Q. This next sheet, July 23rd, 1954, what does that represent? A. This one? [113]

Q. Yes.

A. "Got exchange starting clutch"——

That is the little motor on the big motor. The clutch had worn some, and we took the small motor off and I put the clutch on myself.

Q. And the total bill there is $121.89?

A. That is right. Had to bring the old one to the shop to be repaired. It was an exchange deal. I exchanged it on the new one.

Q. And the total bill on this was $892.80?

A. That is right.

Q. Then July 8, 1954, another fairly minor thing?

A. "Check and set valves, plugs, timing and install service mag. Plus parts, plus repair of mag."

That is a routine check.

Q. And the total bill there? A. $38.03.

Q. Now, these records, I notice, Mr. Shepard, pertain only to 1954. The subpoena calls for your 1953 records, too. Do you have those?

A. I don't have those. Those are probably sent to the boy that was sharecropping.

Q. They wouldn't have come to Sanders and Shepard?

A. Probably Sanders and Shepard, but they would send them to him. [114]

Q. They would send them to him. Do you recall any trouble that was had with the well that summer of 1953?

(Testimony of Elmer F. Shepard.)

A. 1953, the last two years back from—yes, we wasn't satisfied with the performance of the bowls, so we pulled the pump and put a different type bowl on, and then enclosed the impeller in 1953.

Q. What caused your dissatisfaction with the performance of the bowls?

A. Well, we didn't think that—the impeller seemed to be more efficient, and it was standing abrasive substance better.

Q. Such as sand? A. Silt.

Q. Had the output of the well dropped seriously at the time you went in there in 1953?

A. No. I might add, Gordon Cameron, I believe, put on the same type bowls. It was recommended to put that type bowls in.

Mr. Rehnquist: We offer Plaintiff's Exhibit 9 for identification in evidence.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(Said statements were received in evidence and marked as Plaintiff's Exhibit 9.)

Mr. Rehnquist: Will you mark these for identification? [115]

The Clerk: Plaintiff's Exhibit 10 for identification.

(Said statements were marked as Plaintiff's Exhibit 10 for identification.)

Q. (By Mr. Rehnquist): Did you have any other trouble that summer of 1953 besides this time that you replaced the bowls?

(Testimony of Elmer F. Shepard.)

A. Well, I will tell you. He was the head farmer out there that year. There was a lot of times I wasn't even out.

Q. I presume if you had occasion to pay a thousand dollar bill to State Tractor, you would know?

A. If it was anything serious, I would have been there.

Q. It is just the minor service checks you wouldn't know about? A. That is correct.

Q. One more question on that 1954 records. Those are all the statements you received for 1954?

A. That is all I could find. As far as I know, that is it.

Q. And you don't recall any other serious trouble you had in 1954, or any other big amount you paid to State Tractor?

A. Not on that season, no. Let's see. There could be a bill the time they pulled it out and found it was the gas pressure. I don't know whether that was in there or not.

Q. Do you remember when that was?

A. It was some time prior to the August. [116]

Q. They didn't do anything to the bowls at that time?

A. They have to take them in to break them open. If there was the least thing wrong, they fixed it. Whenever you have $23,000 tied up in machinery and the cotton crop depending on it, if there was anything slightly damaged, it is a good policy to replace it.

Q. Handing you Plaintiff's Exhibit 10 for identification, the first sheet; March 9th, 1953, it is ad-

(Testimony of Elmer F. Shepard.)

dressed to Sanders & Shepard, that was the partnership under which you were farming? A. Yes.

Q. Do you recall receiving a statement like that from State Tractor & Equipment Company for $1,550.79? A. That is when?

Q. March 9, 1953?

A. I don't know whether I got one, or whether Sanders got it.

Q. But one of you probably got it?

A. Oh, yes; one of us would have gotten it.

Q. If that is what State Tractor's records show, it got to either you or Mr. Sanders?

A. That is right.

Q. And that is for $1,550.79?

A. That is right.

Q. The second sheet, dated June 30, 1953, would this have [117] been the time you had the trouble with the engines?

A. No. As you can see there, that was the mufflers that was put on the engines, $313.00.

Q. That whole account is for the mufflers?

A. It says right up here, mufflers.

Q. I was wondering if that was covering the whole thing?

A. It covers the whole thing.

Q. Then a statement appears on the top——

A. It is listed here, "Superior (Mufflers). $305.93. Tax, $7.65; $313.58."

Q. In July 22, 1953, a statement for $1,962.00. Was this that time you referred to that you replaced the bowl material?

(Testimony of Elmer F. Shepard.)

A. You are going back so far there that it is almost impossible for me to tell one bill from the other. It could be.

Q. You will notice here it says, "¼ stage Fig. 6922 Bowl Assembly, 767 Bronze Impellers."

Wasn't that about the kind of work you described taking place in the summer of 1953?

A. Yes; probably so. At that time I didn't know much more about the workings of a pump than you do.

Q. That is mighty little.

A. That is why I had that man farming for me. I didn't understand that. [118]

Q. Presumably if State Tractor's record showed that, that would be a correct statement?

A. Yes.

Q. You also had some service from State Tractor in connection with Mr. Cameron's deepening in the winter of 1953-1954, did you not?

A. Yes; I think they put the pump back in.

Q. And they also pulled it, did they not?

A. I think they pulled the pump. Gordon moved the engine.

Q. So this statement from State Tractor & Equipment Co. to Sanders & Shepard of January 25, 1954, for $798.64, that would be for pulling and reinstalling the pump?

A. Yes; I think so. "Pull customer's pump and lay on the ground. Reinstall after well is deepened. Clean up bowls."

(Testimony of Elmer F. Shepard.)

Q. That is the correct statement of the work they did at that time?

A. $798.64. As far as I know, that is what it is.

Q. Then on February 22, 1954, you received a statement from them for $1,072.07?

A. February 22nd, 1954. "Move engine and install on new foundation."

Oh, when he deepened the well, he injured the former engine foundation, and we had to put in another one. That was [119] when the pump was put back in the deepened well.

Q. That was still in connection with the deepening of the well by Mr. Cameron?

A. Mr. Cameron was through. He had already moved off, and we were putting the pump back in. That is the bill for putting the pump back in.

Q. Then this next sheet, May 18, 1954, a bill for $1,064.43, were the bowls repaired at this time?

A. Fifth month, 18th day, 1954. That was along in May. This is a bill, this is the time, I suppose, that they made a mistake, and finally found that it was the gas pressure on the engine.

Q. So there was no need to repair the bowls at that time?

A. They always clean them up and find something to do.

Q. It was not necessary to remove the pump for the purpose of repairing the bowls?

A. It turned out to be the same thing when they put it back in the hole. It was fluctuation in the gas pressure.

(Testimony of Elmer F. Shepard.)

Q. And there was no decrease in the output of the well that caused you to have it gone back into?

A. Absolutely not.

Q. And this August 3rd, 1954, statement, $892.80, that is the same thing we went over?

A. Yes; that is the same thing, I guess.

Mr. Rehnquist: We offer Number 10 in [120] evidence.

Mr. Burch: No objection.

The Clerk: Plaintiff's Exhibit 10 in evidence.

(Said statements, State Tractor & Equipment Company, were received in evidence and marked as Plaintiff's Exhibit 10.)

Q. (By Mr. Rehnquist): Then it is your statement, Mr. Shepard, that on none of these occasions when the pump was pulled was there any decrease in the output of the water that caused you to pull it?

A. Naturally, there could have been some decrease. It might not have been noticeable to the eye.

Q. How much decrease could there have been?

A. I couldn't state that.

Q. Could it have been 100 gallons a minute?

Mr. Burch: If the Court please, that is highly speculative.

The Court: The witness says he can't answer. Why waste time with that?

Q. (By Mr. Rehnquist): Did you ever have any difficulty with the cooling system of the engine on the pump? A. Yes; some.

Q. What was the problem?

(Testimony of Elmer F. Shepard.)

A. Well, in order to make the exchanger perform efficiently and circulate the right amount of water through the [121] gearhead to keep the gearhead cool, you should have some, you should use your butterfly valve, or have some kind of installation to hold it up over the coil. The coil is a good deal like the radiator in a car. It should have water completely over the top of it.

Q. Why did you request Mr. Cameron to go back into your well less than a year after it was dug?

A. I figured that he might cure some of the silt condition, and probably develop a better well.

Q. Did you regard the well as unsatisfactory prior to Mr. Cameron's going back into it?

A. I didn't think so. I wouldn't have deepened it if I hadn't thought the well had produced a crop.

Q. You weren't satisfied with its performance, though, were you? A. Oh, no; not entirely.

Q. How much did you pay Mr. Cameron to go back into the well?

A. I think I paid him $5.00 a foot.

Q. How much was his total bill for those services in deepening the well?

A. I wouldn't know. I think the bill is over there. Mr. Burch has the bill.

Mr. Rehnquist: May this be marked for identification?

The Clerk: Plaintiff's Exhibit 11 for identification.

(Said statement, Gordon Cameron, was marked as Plaintiff's Exhibit 11 for identification.) [122]

(Testimony of Elmer F. Shepard.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 11 for identification, is this the statement you received from Mr. Cameron for his services in opening the well? A. That is right.

Q. And that is in the amount of $6,039.83?

A. $6,217.61.

Mr. Rehnquist: Oh, $6,217.61. We will offer it in evidence.

Mr. Burch: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 11 in evidence.

(Said statement, Gordon Cameron, was received in evidence and marked as Plaintiff's Exhibit 11.)

Q. (By Mr. Rehnquist): Had the output of the well decreased substantially from the 2,000 or 2,200 level at the time you asked Mr. Cameron to go back into it?

A. No. We had completed the crop, and we was trying for a bigger well, more water.

We was through with the crop, and we had some time, and we figured we might make a 3,000-gallon well out of it, or better, because there are some 3,000-gallon wells in that territory.

Q. You were willing to pay $6,000 just to make a good [123] well better? A. That is right.

Q. That was the main purpose of Mr. Cameron's going back in to deepen the well? A. That is it.

Q. Do you know the output of the well, or could

(Testimony of Elmer F. Shepard.)

you estimate the output of the well in gallons per minute just before Mr. Cameron went in?

A. No; I couldn't.

Q. You don't have any idea what it was putting out? A. No.

Q. Were you present during part of the time Mr. Cameron had his rig there?

A. Most of the time.

Q. Were you aware they struck an obstacle at about 477 feet? A. I certainly was.

Q. Mr. Cameron did deepen the well at this time?

A. That is right.

Q. How much, do you know?

A. Well, I think he went from 1,033 to 1,375, or close to 1,375, I believe it was.

Q. Was this added depth cased? A. No.

Q. To your knowledge, did water come in through this [124] added depth?

A. I wouldn't know that. That is 1,373 feet below the surface.

Q. Do you know what the output of the well was when Mr. Cameron got through and got the pump back out?

A. About the same as it was before.

Q. You stated you had no idea at all what it was before, is that correct? A. Not exactly, no.

Q. So you have no idea what it was afterwards, either? A. Not exactly.

Q. Could you make an estimate?

A. Well, I didn't figure it was pumping over 2,200.

(Testimony of Elmer F. Shepard.)

Q. Did you figure it was pumping under 2,200?

A. It would have been either 2,200 or under. It was not over.

Q. How far under could it have been?

Mr. Burch: We are going to object to speculation again. The man has answered to the best of his ability.

The Court: He said he doesn't know.

The Witness: There is no water device that has been manufactured yet that will measure a well within five feet of the true capacity.

Q. (By Mr. Rehnquist): You are capable of estimating, aren't you? [125]

Mr. Burch: The Court has ruled on it, Mr. Shepard.

The Court: Yes.

Q. (By Mr. Rehnquist): Is it your statement the output of the well has been pretty constant from up to the time it was drilled until the time you sold it?

A. That is right.

Q. The discharge pipe had an elbow spout on it when you sold the property, didn't it, or a bonnet?

A. A bonnet.

Q. When was that put on, do you know?

A. It was put on almost a year before Otto bought it. That was put on immediately after the well was deepened.

Q. When would that have been?

A. That would have been in the first part of 1954, probably in February. In January or February.

Q. It couldn't have been after that?

(Testimony of Elmer F. Shepard.)

A. No; it couldn't.

Q. Who put it on for you?

Mr. Burch: We will object to the question. It is assuming a fact not in evidence. There was no testimony it was put on for Mr. Shepard.

Q. (By Mr. Rehnquist): Do you know how that bonnet got there, Mr. Shepard?

A. Yes; I know how it got there. [126]

Q. How did it get there?

A. It was put on by a man that worked for me and Gordon Cameron's foreman.

Q. What was his name?

A. Ernest Woods.

Q. Did he put it on at your request?

A. He put the bonnet on at my request.

Q. You know then when he put it on, is that correct? A. Yes.

Q. It was in February, 1954?

A. I wouldn't say February or January. I don't remember exactly when it was. Some time after the well was deepened.

Q. Was there also a flange welded in that spot?

A. I found out later they put one in.

Q. When did you find that out?

A. Oh, probably thirty days or better after it had been put in.

Q. When was it put in?

A. I was told it was put in when the bonnet was put on.

Q. That would have been in January or February, 1954? A. January or February, 1954.

(Testimony of Elmer F. Shepard.)

Q. You didn't request that that flange be put in?

A. Not the flange. I requested the bonnet.

Q. When did you decide to sell this property, Mr. Shepard?

A. I hadn't completely decided to sell it when Otto [127] approached me to buy it. I told him I didn't know exactly whether I wanted to sell it at that time or not. I had a good crop.

Q. Did you ever list it with a real estate broker in Buckeye? A. At one time.

Q. When was that?

A. At some time prior to the time Otto bought it. I don't remember when.

Q. Could you remember as a matter of months? Was it in the summer?

A. I wouldn't make a guess. I don't know.

Q. Could it have been as much as a year before?

A. No; I don't think it was a year before.

Q. At what price did you decide to sell the land?

A. 250 a acre. 80,000.

Q. Did you ever ask less for it than that?

A. No.

Q. What real estate broker did you give it to?

A. Gus Goodman had the listing.

Q. Did you ever tell Mr. Roberts out in Buckeye it was for sale?

A. I don't remember whether I did or not. All of those real estate agents are trying to get you to list your property with them. [128]

Q. And you could have told Mr. Roberts, or Robbins? A. I could have.

(Testimony of Elmer F. Shepard.)

Q. Could you have quoted him a lower price than $80,000? A. Absolutely not.

Q. When you first bought that land in 1952, you were pretty much of a pioneer out in the Harqua Hala Valley, isn't that right?

A. That is right.

Q. Were there many other people out in the area?

A. When I first started?

Q. Yes.

A. In that area there was only two or three other farms.

Q. Who were the operators of those farms?

A. Gordon Cameron, right west of me. Ernest Hollenstein, to the east, and Grummell, in that area.

Q. Was Raymond Benson out in that general area?

A. Yes; there is another place over there. He had the Stall place leased.

Q. Was Ed Swindle out there?

A. Not when I first started. They started after I did.

Q. When did they come in?

A. I don't know that.

Q. Did Gordon Cameron keep his property out there until after you had sold yours?

A. Did he what? [129]

Q. Did he keep his property out there until after you had sold yours? A. He still has it.

Q. Did you see quite a bit of Mr. Cameron while you were farming together out there?

A. Most every day.

(Testimony of Elmer F. Shepard.)

Q. Is he a friend of yours? A. Very good.

Q. How long have you known him?

A. Well, ever since he has been in this country, probably 7, 8, 9 years.

Q. Were you pretty good friends with Ed Swindle? A. Good friend.

Q. Were you pretty good friends with Raymond Benson?

A. A good friend. Out that far you try to be friends with everybody.

Q. Did you see these people frequently while you were first farming out there?

A. That is right.

Q. They are all still in the Buckeye area, aren't they? A. Yes.

Q. Did you bring with you in response to a subpoena your receipts for gravel put in the well?

A. Yes.

The Court: We will have our afternoon recess.

(The afternoon recess was had.) [130]

Mr. Rehnquist: Your Honor, at this time, counsel will stipulate we may interrupt the testimony of Mr. Shepard, and call Mr. Cameron.

The Court: All right.

Mr. Rehnquist: May we have these marked for identification as Plaintiff's Exhibits 12 and 13?

The Clerk: Plaintiff's Exhibits 12 and 13 for identification.

(Said reports of well driller were marked as Plaintiff's Exhibits 12 and 13, respectively.)

(Testimony of Elmer F. Shepard.)

Mr. Rehnquist: Your Honor, at this time we will offer 12 and 13 in evidence. They are certified copies of records certified in the Land Department.

Mr. Burch: We will object. No foundation laid.

The Court: What is the purpose?

Mr. Rehnquist: The purpose is to show a description of prior conditions on the property at the time the second well was drilled, their remarks on the record.

The Court: They may be received subject to the objection.

Mr. Burch: If the court please, I don't even know what is on them.

The Court: Neither do I.

Mr. Burch: Neither does the court.

The Court: I will look later.

Mr. Burch: All right, subject to the [131] objection?

The Court: Yes.

The Clerk: Plaintiff's Exhibits 12 and 13 in evidence.

(Said reports of well driller were received in evidence and marked as Plaintiff's Exhibits 12 and 13.)

GORDON CAMERON

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Mr. Cameron, will you state your full name to the Court? A. Gordon Cameron.

Q. Where do you reside? A. Buckeye.

Q. How long have you lived out there?

A. About 9 years.

Q. And where did you live before that?

A. Bakersfield, California.

Q. What is your occupation?

A. Well drilling.

Q. How long have you been in that occupation?

A. 30 years.

Q. So you have drilled wells both in Arizona and California?

A. Colorado and New Mexico; a lot more of them; yes. [132]

Q. Are you acquainted with Mr. Ernest Otto?

A. Yes.

Q. How long have you known him?

A. About two years.

Q. Are you acquainted with Mr. Elmer Shepard?

A. Yes.

Q. How long have you known him?

A. About 8 years.

Q. Do you own land in the Harqua Hala Valley?

A. Yes.

(Testimony of Gordon Cameron.)

Q. How much? A. A half section.

Q. Where is it in relation to the property Mr. Shepard sold to Cal-Nine Farms?

A. West, adjoining west.

Q. Does it adjoin it?

A. It adjoins it, west.

Q. Did you, in response to a subpoena, bring with you your records pertaining to your work on the Shepard property? A. Yes; I did.

Q. You did drill a well for Mr. Shepard on that property? A. Yes.

Q. When was that well drilled? Consult your records, if you want to.

A. We started drilling the 4th and the 5th of 1953. [133]

Q. 4th and 5th of what? A. April 5th.

Q. April 5th, 1953? A. Yes.

Q. And when did you finish? If you don't have it right there in the records, could you just estimate it?

A. We finished April 27th, 1953.

Q. And did you at that time file Report of Well Driller with the State Land Department in connection with the drilling of that well?

A. I don't remember what date we did file that, but we did file.

Q. Handing you Plaintiff's Exhibit 12, is this that report? On the other side you will see your signature. A. Yes.

Q. And that is your signature on the report?

A. I think it is.

Q. And was this report prepared by you?

(Testimony of Gordon Cameron.)

A. Yes.

Q. And were these remarks placed there by you?

A. No.

Q. Do you know who did place them there?

A. No; I don't.

Q. How deep was the well you drilled for Mr. Shepard? A. 1,033 feet. [134]

Q. Do you know what the output of the well was in gallons per minute when you first pumped it after drilling? A. No.

Q. Could you estimate?

A. Pretty hard to estimate it.

Q. Do you know of your own knowledge any of the history of that well with regard to repairs, between the time it was brought in in the winter of 1953-1954, during that crop season?

A. I don't remember.

Q. Did Mr. Shepard that winter request you to go back into the well?

A. Let's see. Would that be in 1954?

Q. That would be the winter of 1953, or the early part of 1954. A. December 29, 1953.

Q. What date is that, sir?

A. December 29, 1953.

Q. Was that the date you began deepening the well? A. Yes.

Q. And Mr. Shepard had requested you to deepen it before that time?

A. Well, we just talked it over now and again.

Q. You did have a conversation with him about it? A. Yes. [135]

(Testimony of Gordon Cameron.)

Q. Did he give you any reason for why he wanted it deepened?

A. He thought maybe we could make a better well out of it.

Q. Did you quote him a price? A. Yes.

Q. What was the price?

A. I have that at home, but I don't remember. But I have it at home.

Q. When you say you thought you could make a better well out of it, had there been trouble with the well?

A. Well, it never was a good well from the day it was drilled.

Q. Was the principal purpose when you went in to deepen the well?

Mr. Burch: I think he has already stated, to make a better well of it, if the Court please. It is repetitious.

The Court: He can tell how he expected to do it.

The Witness: To make a better well out of it.

Q. (By Mr. Rehnquist): At the time you started this operation, did you plan to deepen it?

A. That is right.

Q. Did you file an application to deepen it with the [136] State Land Department?

A. That would be Elmer Shepard's, and I don't know when he filed it.

Q. Do you have the Daily Worksheets with you pertaining to that deepening operation in December, 1953? Were you personally present all the time this work was going on? A. No.

(Testimony of Gordon Cameron.)

Q. Are these records kept in the ordinary course of your business? A. Yes.

Q. And are they kept under your supervision?

A. The best I can. Sometimes the boys forget to write things down.

Q. Calling your attention to this worksheet of December 29, 1953, would you read the remarks?

Mr. Burch: Before they are in evidence?

Mr. Rehnquist: We will put them in evidence.

Mr. Burch: Let us get them in evidence, if the Court please.

Mr. Rehnquist: I didn't want to introduce the originals. Can we have these marked for identification?

The Clerk: Plaintiff's Exhibit 14 for identification.

(Said log records were marked as Plaintiff's Exhibit 14 for identification.) [137]

Q. (By Mr. Rehnquist): Do these appear to be photostats of your log records? A. Yes.

Mr. Rehnquist: Do you want to look at these?

Mr. Burch: Let me just check them.

May I ask one question on voir dire, then?

The Court: All right.

Q. (By Mr. Burch): Mr. Cameron, you stated that these records are kept the best you can, and there are things sometimes the boys don't put on there, is that correct? A. Oh, yes.

Q. How about yourself? Do you occasionally fail to keep a complete record, too?

(Testimony of Gordon Cameron.)

A. That is right. If I catch them I try to keep them right.

Mr. Burch: We have no objection to these.

Mr. Rehnquist: We will offer them in evidence.

The Clerk: Plaintiff's Exhibit 14 in evidence.

(Said log records were received in evidence and marked as Plaintiff's Exhibit 14.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit Number 14, the first sheet, dated 12-29-53, Mr. Cameron. Would you read the remarks there?

A. "Started in hole, bit hit something at app. 477 feet." [138]

Q. Were you present when the bit hit something?

A. No.

Q. Were you called in shortly afterwards?

A. Yes.

Q. And calling your attention to the second sheet, 12-30-53, of Plaintiff's Exhibit Number 14, would you read the remarks in the left-hand corner, left-hand column, rather?

A. Came out of hole with 15-inch bit, wouldn't go. Went back with 12¼. Wouldn't go past 458. Came out and went back with drill collar. Drill collar took weight once at 458.

Q. Am I correct in this statement, then, that a 15-inch bit failed to go beyond the 400-foot area of the well? A. Went to 477.

Q. And wouldn't go further, is that correct?

A. That is right.

(Testimony of Gordon Cameron.)

Q. And then a 12¼-inch bit was inserted, and that would not go past 458 feet?

A. That is right.

Q. And then a 10-inch drill collar was inserted, and it took weight at 458 feet?

A. That is right.

Q. What does the expression "take weight" mean, Mr. Cameron?

A. Well, you can set it on something, put it [139] down.

Q. So in effect the 10-inch drill collar wouldn't go beyond 458?

A. It did, but it touched that.

Mr. Rehnquist: Would you read that answer?

(Answer read.)

The Witness: It took a little weight there and went on.

Q. (By Mr. Rehnquist): Then would you read the remarks in the second column of Plaintiff's Exhibit 14, the sheet dated 12-30-53?

A. Well——

Q. That may not be necessary. Would you read the remarks in the third column?

A. I can read them.

Q. Okay. Will you read the remarks?

A. 16 feet of the 4th single—that is the 4th joint, rather, of 4½ in hole is bad place in hole.

Q. Then would you read the remarks in the third column?

A. "Came out of hole. Went in with impression

(Testimony of Gordon Cameron.)

block. Came out of hole and went back in with 12¼ bit. Drilled through bad place and went on to bottom."

Q. So it was necessary to drill through this area at 477 feet? A. Yes.

Q. Did you have any opinion as to what caused this obstruction, Mr. Cameron? [140]

A. No; I don't.

Q. Do you have any opinion as to what was drilled through when you finally drilled through with a 12¼-inch bit?

A. No; we never had any more trouble with it.

Q. Do you have any opinion what you drilled through at the time you drilled through with the 12¼-inch bit?

A. No; I don't know. We ran an impression block, and it never shows any marks on it.

Q. Is it possible to say what size bit or collar would have gone through there without drilling?

A. Well, the 12¼ went.

Q. That was with drilling, wasn't it?

A. Very little. It took a little weight. Of course, the 10-inch drill collar did the same thing.

Q. It took weight?

A. Yes, and if you recall, we had a 15-inch bit in to 477, and when we came back out, our 12¼ took weight, also the drill collar at 458, I believe it was.

Q. And what is your interpretation of those facts?

A. Those are kind of mysteries. You can't realize what is taking place.

(Testimony of Gordon Cameron.)

Q. Was Mr. Shepard present during part of this work? A. Yes.

Q. Did you inform Mr. Shepard of this trouble at 477 feet?

A. We talked about it; we talked about the well as we [141] drilled all the way through.

Q. So he was constantly acquainted with your progress?

A. Yes. Maybe he wouldn't be out there for a day or two, but he was always out there.

Q. Did he ever give you any instructions as to what to do?

A. He said he didn't know what to do.

Q. Did he ever request you to line the casing at this trouble spot? A. No.

Q. Did you put a liner in there?

A. After we run the impression block, we didn't think it was all right; we didn't think it was any place in the well to bother with.

Q. How much did you deepen the well at this time, Mr. Cameron?

A. We drilled the well from 1,033 to 1,373 total depth.

Q. Did you case the extra depth? A. No.

Q. Was this extra depth what they call a wet hole? A. Pardon?

Q. Was this extra depth a wet hole? Did it fill with water down there?

A. You mean, was there water in the hole?

Q. Yes. A. Yes. [142]

Q. Below 1,033? A. Oh, yes.

(Testimony of Gordon Cameron.)

Q. Did you have a conversation with Mr. Otto about the well after he had bought the property, and shortly before you went to Canada last summer?

A. Yes.

Q. Were you called out to the property by Mr. Otto, or requested to come out?

A. I don't remember.

Q. Did you have a conversation at the pump site on Mr. Otto's property?

A. Maybe I did. I was out there.

Q. Did he ask your advice about the well at that time?

A. When we talked about drilling a new one?

Q. I mean before you went to Canada last summer.

A. Yes; he did. I remember now we talked about that.

Q. What advice did you give him?

A. I told him I wouldn't stop that well any more than I had to; I would keep that steady running.

Q. Did you regard that as the best remedy under the situation?

A. Under that sand and silt condition, yes.

Q. And did you and Mr. Otto have a conversation with respect to the well last fall at his house?

A. Yes; of drilling a new well. [143]

Q. Was the conversation about drilling a new well? A. Yes.

Q. Who was present at that conversation?

A. Well, I don't remember, but I believe my wife,

(Testimony of Gordon Cameron.)

and his wife, and he and I. I believe that is right. I am not sure.

Q. And did you at that time advise him as to whether or not he should attempt to repair that well?

A. I think I advised him against repairing it.

Q. Why did you advise him against repairing it?

A. The way I figured, that he was pumping so much sand and silt, that you would have to pull that pump once every year, or twice, which cost you $2,000 a round trip.

Q. And it wouldn't have been economically feasible to keep on operating that well?

A. That is the way I thought.

Q. Did you make any further statement at that time as to what was wrong with the well, other than the sand and the silt?

A. I don't remember of it.

Q. You don't remember whether you did or not?

A. I don't remember.

Q. Did you in fact drill a new well for Mr. Otto and for Cal-Nine? A. Yes. [144]

Q. How deep is this new well?

A. 1,500 feet.

Q. And what casing diameter have you used in the new well? A. In distance?

Q. And depths, please.

A. I haven't got that with me, but it is approximately 525 or 30 feet of 20-inch, and the balance 16, 16-inch O.D.

Q. That is in the new well?

(Testimony of Gordon Cameron.)

A. No. Wait a minute. Pardon me. 12-inch. 12-inch.

Q. 530 feet of 20-inch O.D.? A. Right.

Q. And then the rest is 12-inch O.D.?

A. That is right.

Q. How does that compare with the earlier well on that property that you drilled for Mr. Shepard?

A. There is no comparison.

Q. I mean as to the O.D. and length of the casing.

A. The other one had 20-inch at 460, and the balance was 16.

Q. And is the depth you drilled this new well to, in your opinion, necessary for a good well on this property? A. That has been proven; yes.

Q. You didn't drill it any deeper than you felt you had to? [145] A. No.

Q. And was the manner in which you cased and perforated the well all necessary to get a good well on this property?

A. I didn't get the first part.

Q. Were the manner in which you cased and perforated this new well all necessary to get a good well on this property?

A. That is the way we do it, and we got a good well, so we sure think that.

Q. You didn't do any more than was necessary to get a good well? A. Not to my knowledge.

Q. Do you remember approximately what you charged for your services?

The Court: The bill is in evidence.

Mr. Rehnquist: Okay.

(Testimony of Gordon Cameron.)

Q. (By Mr. Rehnquist): When was your own well drilled, Mr. Cameron?

A. Well, let's see. Four years ago, I believe.

Q. And did you pack it with gravel at the time you drilled it? A. Yes.

Q. Did you add gravel on subsequent occasions?

A. Yes.

Q. About how often did you add gravel to that well?

A. I would have to look back on my gravel receipts. I [146] don't remember. It was various times.

Q. Would it have been once a month?

A. Well, we would add some gravel to it, and maybe it would go three or four months. We kept the pile up on top of the ground there, and a hole down underneath, so it would take it as it could, and we just kept that pile there.

Q. How often would you replace gravel on the pile?

A. We put 440 tons. I don't know how often we added to it. There was 440 tons of gravel in the well.

Q. Did you ever advise Mr. Shepard when he owned this well that he ought to drill a new well?

A. No.

Q. Did you ever tell him you thought he had a bad well?

A. I didn't have to tell him. We all knew it was pumping that silt and sand. We talked several times about if we ever did drill a new one, how we would do it.

Mr. Rehnquist: No other questions.

(Testimony of Gordon Cameron.)

Cross-Examination

By Mr. Burch:

Q. When you refer to it as a bad well, you refer to a silt and sand condition, is that right?

A. Yes.

Q. And it did pump plenty of water to irrigate Mr. Shepard's land?

A. Yes; he irrigated. I believe he had the whole place [147] in that first year it was planted.

Q. That would be 300 and some odd acres?

A. I believe it was 300, between them.

Q. Your well and his well were about the same, as far as the condition of the water, is that correct?

A. I believe that is about right.

Q. Was yours about the same depth, also?

A. No; mine is 930. It is cased to 930, and the bottom is 944.

Q. You say, I think, you put in 440 tons of gravel altogether in your well, and it stopped taking it after that? A. It took a little bit the other day.

Q. As I understand it, you dug under one time to make room for gravel, is that right?

A. That is right.

Q. Do you know whether or not any gravel was put in Mr. Shepard's well?

A. Yes; there was gravel put in it.

Q. Who put it in?

A. We put a lot of it in.

Q. Do you have any idea how many tons you put in?

(Testimony of Gordon Cameron.)

A. I don't know. We could get the figures.

Q. Was it a matter of 150, 200 tons?

A. I can't remember just what we did put in there.

Q. You put in all it would take? [148]

A. We filled it up, yes, when we drilled it.

Q. Did you ever furnish him gravel after that on occasion?

A. No; I don't have anything to do with gravel.

Q. Did you ever tell Mr. Otto that Mr. Shepard's well had collapsed? A. No.

Q. Did you ever tell him that it was broken?

A. No.

Q. Did you ever tell him that was the reason it wouldn't produce any water? A. No.

Mr. Burch: I would like the reporter to find the statements of Mr. Otto in regard to what Mr. Cameron told him.

The Court: She can do that tonight.

Mr. Burch: I would like to have it while I have this witness on the stand.

The Court: We aren't going to fool with that now.

Mr. Burch: May the record show I have requested the reporter to find the statements of Mr. Otto which he made on the stand with regard to what Mr. Cameron told him with regard to the well, and that the Court has advised me not to go any further with it?

The Court: At this time. [149]

Q. (By Mr. Burch): You never, then, told Mr. Otto at any time that that well was broken or collapsed, is that correct?

(Testimony of Gordon Cameron.)

A. Not that I remember.

Q. Did you ever know such a thing had occurred?

A. No.

Q. Did you ever notice any decrease in the output of that well from what it was originally?

A. Yes; I noticed that.

Q. And when did you notice that?

A. At various times that I would be out there. I don't know what date it was, or anything.

Q. Did you notice it when Mr. Otto had the property?

A. Yes; I seen the well when Mr. Otto had the property.

Q. Did you ever recommend to him that he pull the bowls? A. Not that I remember of.

Q. Did there seem to be any difference in the capacity of the well after you had deepened it, and the capacity before?

A. Yes; it was a little better.

Q. It was a little better?

A. But not as good as we expected.

Q. You had expected, I take it, that it would be increased considerably in capacity by that additional depth? A. I beg your pardon?

Q. You had expected that its capacity would be considerably increased? [150]

A. I might explain, if the deepening job would go off like we had hopes it would. We had a lot of trouble trying to get circulation. We wanted to go to 1,500, but we couldn't do it.

Q. That was because there was too much water

(Testimony of Gordon Cameron.)

down at the bottom?

A. No; we never could get circulation back.

Q. You put mud down at the bottom?

A. Yes.

Q. And that kept washing away, is that correct?

A. Yes.

Q. When Mr. Rehnquist asked you if there was water in the hole, there was water for a considerable distance above 1,000 feet, is that correct?

A. Yes.

Q. Where was the water level?

A. I think it was right close to 200 feet.

Q. You stated you put an impression block in when you found there was some difficulty in the shaft. What is that impression block?

A. An impression block is similar to a blade. We pour lead facing on it, and when you go down in a well, if you set down on something that is sticking up in the well, like maybe a casing may be out, when you set down you get an imprint on that lead, and pull it out of the hole and look at the bottom [151] of it.

Q. It would show on the bottom of this impression block if the pipe had collapsed, or if there was a major obstacle? A. That is the purpose of it.

Q. And you stated there was no such showing?

A. There was not a mark on it. We have it laying in our yard at home now.

Q. Was it your impression this bad spot was a serious obstruction in the shaft of this well?

A. When we first hit it, we thought it was. When

(Testimony of Gordon Cameron.)

we couldn't get an impression that would show the pipe was in two, or anything, we just disregarded it and went on.

Q. Is that a common occurrence, that there be some narrowing of a pipe at one place or another?

A. Yes; that is very possible.

Q. If it was just a matter of an indentation in the pipe for an inch or two, you would get the same result? A. That is right.

Q. What this was you don't know?

A. I don't know.

Q. You stated you didn't pay much attention to it?

A. I was quite concerned with it until I talked with Mr. Shepard, and he said 12 and a quarter was all right. He would be satisfied if he could get a 12¼ hole down to 1,500 feet. [152]

Q. With regard to your own well, Mr. Cameron, what kind of production does it have?

A. Oh, I think around 15, 1,800 gallons.

Q. Does it have any silt in it?

A. Very bad.

Q. Do you have to replace your bowls occasionally?

A. I think I have the third set in there.

Q. Did you ever discuss this matter with Mr. Otto prior to his purchase of the Shepard property?

A. Well, there was discussions there, but I don't remember whether it was before or after, or when it was. I don't remember when.

(Testimony of Gordon Cameron.)

Q. He had made a number of inquiries of you about the Shepard property prior to its sale?

A. I wouldn't say he made a number of inquiries.

Q. He made some?

A. I think he talked a little about it.

Q. That was over at your place?

A. I don't reme.nber. It might have been on the road some place. I don't know.

Q. Did you have a chance to observe the crop Mr. Shepard raised in 1954? A. Yes.

Q. How did it compare with your own?

A. I think he had a pretty good crop. [153]

Q. He had about how many acres in it at that time? A. It was 1954?

Q. That was the year before.

A. Was that allotted then? Was cotton allotted then?

Q. Yes.

A. I think he had around—I don't know, I think he had around 100 acres, although it may be a little more.

Q. Could he have had about 205 acres?

A. I don't remember that.

Q. Did he irrigate it, whatever he had?

A. What?

Q. Did he irrigate all he had at that time with his own well?

A. No; I think he got some water from us that year.

Q. That particular time he got water from you for about ten days, didn't he?

(Testimony of Gordon Cameron.)

A. I don't remember how long it was.

Q. You let him have the water? A. Oh, yes.

Q. And then, other than for that short period, whatever it was, he used his own well, is that correct?

A. That is right; as far as I know, as I remember.

Q. And your observation was he had a good crop, whatever the acreage?

A. Yes; I think Elmer had a pretty good [154] crop.

Q. Did you do any work on his well in 1954?

A. This all shows 1953.

Q. There was no necessity, apparently, for you to do any work in 1954, is that correct?

A. The deepening job was done in 1953. That is the last we worked on it.

Q. That was the last personal knowledge of Mr. Shepard's well that you had, is that it?

A. That is right.

Q. And at the close of that deepening job, you observed its pumping capacity, and I think you stated it was slightly increased over what it had been?

A. We finished the deepening job in 1954.

Q. That was in 1954?

A. January 13, 1954.

Q. Did Mr. Otto ever talk with you about a hood and flange that were put on the discharge pipe of that particular well?

A. Yes, I believe that there was something said about it.

(Testimony of Gordon Cameron.)

Q. Can you recall what his conversation with you was?

A. I think he asked me what the hood was on there for. I don't remember the conversation too good.

Q. Do you recall what you told him it was on there for?

A. Yes, I gave him some kind of smart remark.

Q. Did you know what the hood was on there for? [155]

A. No, I don't know what it was on there for.

Q. Had you ever observed it?

A. Yes. You see them on a lot of wells.

Q. Pardon?

A. You see them on a lot of wells.

Q. What is the usual purpose of them, Mr. Cameron?

A. I think most of them was just because people want them, so far as I know. Maybe they got a small place to put their water, and they want to turn it down, or something. They are put on for various reasons.

Q. Did you have a man working for you named Woods? A. That is right.

Q. Do you know whether he was the one that put that on the discharge pipe?

A. Well, now, he did some work over there, but what part of it he did, I wasn't there.

Q. Did you ever make any observation of your own as to the number of siphon pipes that were

(Testimony of Gordon Cameron.)

used on the Shepard property during the time Mr. Shepard had it?

A. Compared with mine, is that the question?

Q. No, just what he was using.

A. Yes, I expect I did, but I don't remember offhand what it was.

Q. Does your man Woods do some work for Mr. Shepard on occasion, too? [156] A. Yes.

Q. Were you out there during the time of the rains last year, Mr. Cameron?

A. I was out at the very end of them. I was in Canada all the time those rains were going on. When I came back, the rains were just over.

Q. You have seen the flood conditions out there, then, I take it? A. Yes, I saw that.

Q. They are usually quite severe?

A. That is right.

Q. Have you made any preparations on your own property to turn floodwater?

A. Oh, yes.

Q. What have you done?

A. We just put up a dirt bank along the west side of our place. Then we had a high place, and we cut the high place out so the water would not drain out.

Q. The Shepard place is right in line with natural drainage from the mountains?

A. He is right in line with my place.

Q. You are both in line with natural drainage?

A. Yes.

(Testimony of Gordon Cameron.)

Q. Did you observe any damage done to the crop that summer of 1955? [157]

A. No, because I didn't pay too much attention to his. I wanted to take care of my own.

Q. It had done some damage to your property, even though you had it diked?

A. Yes. You see, it was not diked so good last year.

Q. What was the result on your own property last year?

A. It washed our ditches out from it. We couldn't have any water on our cotton. [157-A]

Q. Did that have any effect on your cotton?

A. Yes.

Q. What did it do to it?

A. We couldn't get as much cotton.

Q. Do you have any idea how much it was decreased?

A. I think ours was decreased a half a bale, probably. That is just my opinion.

Q. Did you make any observation of the well on the Shepard-Otto property during 1955? Did you ever go over and look at it, particularly?

A. Yes, I was over there.

Q. Did you notice any decrease in its output?

A. Yes.

Q. Would that have been consistent with the bowls wearing out?

A. Yes, I should think so.

Q. What happens when you pump a lot of silty and sandy water?

(Testimony of Gordon Cameron.)

A. It just cuts your impellers and your pump, cuts your bowls, just won't pump as much water, and the more the wear, the less water they will pump.

Q. What did you have to do to repair that situation?

A. Well, I called a pump company out, and they put on a new set of bowls.

Q. Does that restore it to its original [158] capacity? A. Yes, it has.

Q. It was testified to here that you told him to drill a new well, because the old well had collapsed——

A. To get away from that sand and silt. That is the worst thing we have got there, pumping your sand and silt. It fills your ditches up.

Q. You didn't tell him to drill a new well because the old well had collapsed, but because of this silt condition? A. No.

Q. As far as you know, that well could still produce as much water as it ever did, is that right?

A. It could have been cleaned out. It has got some sand in it.

Q. It would have had to have new bowls and impeller blades?

A. Yes, new set of bowls.

Q. But it was capable of producing?

A. Of course, we don't know. It wasn't ever done that way, but we don't know. We think it would.

Q. There was no reason to think differently?

(Testimony of Gordon Cameron.)

A. It sanded up. We know that today.

Q. You don't know what, or you don't know when that sanding process started, do you?

A. No, I don't know that.

Q. Did you observe the old well, the original one, Elmer [159] Shepard put in 120 feet away from the second well he put in?

A. I was out there a time or two when he was drilling it, and I was out there with Elmer a couple of times.

Q. Did you observe at any time since the floods of last July where floodwater got into that old well?

A. Into the old well?

Q. Yes.

A. The floods were pretty well over when I came back, and, as I said, I was busy and I don't know.

Q. If floodwater had gotten down into the old well, would it have increased the silt condition down where the pump and bowls were?

Mr. Rehnquist: Object. That is extremely speculative. There is no evidence the water ever got in.

The Court: The witness doesn't know anything about that.

Q. (By Mr. Burch): Would floods in that general area of yours, in your experience, cause an exceptionally silty condition in the wells?

A. If it got into it they would. To the best of my knowledge, it would.

Q. I think you stated you told Mr. Otto to run that pump continuously. That is true, isn't it?

A. Yes.

(Testimony of Gordon Cameron.)

Q. Isn't it true that would have an effect of wearing out the bowls faster? [160]

A. That is right. As long as it is pumping clean water, it wouldn't wear the bowls, like that sand and silt does.

Q. Do you know if it pumped sand and silt any worse at one particular time in 1955 than at another?

A. Well, I believe when that sand was moving around, I believe it would pump more sand at one time than you would another. If you can keep the pumps running and keep them steady, they didn't pump as much sand and silt as when they were started and stopped.

Q. I understand in your own well when it is started up, it will take two or three days before the silt condition will clear up?

A. If you aren't careful, it will take longer than that.

Q. I understand Mr. Shepard's well will clear up faster than yours. Did you ever make that observation?

A. I'm not sure about that question.

Q. It would clear up, though, if you started it and were careful? A. Yes.

Q. Apparently when Mr. Otto was operating it, it became a permanent condition, is that correct, the silt?

A. No, I think I have seen lots of clear water come out of that well when Mr. Otto had it.

Q. It did pump clear water after it got rid of the

(Testimony of Gordon Cameron.)

silt condition? [161] A. That is right.

Q. That is true?

A. If you don't agitate it, keep away from agitating it as much as possible.

Q. In Mr. Otto's new well, you ran 530 feet of 20-inch casing, is that right?

A. Approximately. Pretty close.

Q. And that was a considerably more expensive type of casing than Mr. Shepard used, is that correct?

A. We pulled 361 feet of pipe out of the old well and put it in the new one.

Q. That was the 16-inch casing? A. Yes.

Q. The 530 feet of 20-inch casing——

A. That was the 20-inch I am talking about.

Q. And the difference between that and 530 you purchased? A. Yes.

Q. You also didn't perforate the same way on this well, did you? A. Oh, no. No.

Q. And you perforated at a different depth?

A. That is right.

Q. That was to get away from the silt condition out there? A. That is right. [162]

Q. Was that more expensive to have him perforate farther down?

A. No. It was less expensive.

Q. Was it more expensive to drill to 1,500?

A. Yes, that would be more expensive.

Q. The deeper you go, the more it costs?

A. That is right.

Q. Did you put gravel in the new well?

(Testimony of Gordon Cameron.)

A. Yes.

Q. How much did that take?

A. 330 or 40 or 50 tons. I don't remember. We have the figures.

Q. Did you check it since then to see if it needs any more?

A. Yes. I think Mr. Otto is checking that.

Q. You don't know whether it needs any more?

A. No, I don't.

Q. Did Mr. Otto ever ask you if he could use some of your water in case he runs short?

A. I don't remember if he asked me and I made the offer. We talked about it, sir.

Q. Did you tell him how he could use your water? A. Yes.

Q. How was that?

A. I told him to come out of the end of our ditch, and [163] come out on that property right beside us with a ditch, and it would reach his place.

Q. And that was how you had done it before?

A. Yes.

Q. And did you advise him of that?

A. I told him about it.

Q. You told him he could have the water if he needed it, is that correct?

A. When we wasn't using it.

Q. He never attempted to take any of your water, apparently? A. What?

Q. He never used your water? A. No.

Q. At the time Mr. Otto purchased the property,

(Testimony of Gordon Cameron.)

your well and Elmer's well were the only two within that immediate vicinity? The next well was several miles away, is that correct?

A. I didn't get that question.

Q. You had a well on your property?

A. Yes.

Q. Elmer's was right next door to you, so to speak? A. Yes.

Q. Then there were no other wells or cultivated property for a distance of several miles, isn't that true? [164]

A. Jimmy Harrison came in there shortly after that, but I don't recall just when that was.

Q. How far is he from your property?

A. He is a mile and a half away.

Q. He is the closest to you, is that correct?

A. A mile and a half, yes, that is right.

Q. Then there is another about three and a half miles away, isn't there?

A. That is right.

Q. And yours and Elmer's were practically identical?

A. In my opinion, they were about the same.

Q. And you are still using yours?

A. Yes. I don't like it, though.

Q. How much do you irrigate with it?

A. I got 111 acres of cotton I am irrigating.

Q. Do you have any other land under cultivation?

A. Yes, we have some, but we are using it for pasture.

(Testimony of Gordon Cameron.)

Q. What is the most you have irrigated with it?

A. I irrigated the whole place with it. I grew a bale and a half of cotton when I did.

Q. You grew a bale and a half of cotton on how many acres? A. On three hundred.

Q. That was your sole source of supply?

A. Yes. I didn't have enough water for it. [165]

Q. If you had more water, you could have had more cotton with it? A. That is right.

Q. I think you told the court you put in three sets of bowls during that time?

A. I have got the third set now.

Q. That is the kind of operation you told Mr. Otto he shouldn't get into, isn't that right?

A. That is right.

Q. Did he ever ask you about your experience with bowls prior to the purchase of the place, or do you remember? A. I don't remember.

Q. Do you know what Mr. Otto paid for the property?

A. I have heard, but I never saw the figures.

Q. If I told you it was 80,000 dollars, is that the figure you have heard? A. That is right.

Q. Knowing what you know about the well at the time Mr. Otto purchased it, would you say that was a fair price——

Mr. Rehnquist: We object to that. Under the Arizona Rule for Damages in Fraud, the estimate of the value of what you are receiving is utterly irrelevant.

The Court: Yes, I think so. I agree.

(Testimony of Gordon Cameron.)

Q. (By Mr. Burch): You were one of the pioneers in developing that country [166] out there, were you not?

A. Yes, we were one of the first.

Q. You are aware of land values there?

A. Pardon?

Q. You were aware of the land values out there?

A. Yes.

Q. Can you give us your opinion of the value of the property when Mr. Otto purchased it, in the condition it was?

Mr. Rehnquist: Object again on the same grounds.

The Court: Same ruling.

Mr. Burch: If the Court please, I do believe the measure of damages is the difference between the actual value of the property received and the representations of the property value.

The Court: All right, the Court ruled.

Mr. Burch: That is all.

Redirect Examination

By Mr. Rehnquist:

Q. Mr. Cameron, was the plan for getting water from your place to Mr. Otto's, what you described to Mr. Otto, did that involve taking water through a ditch outside of either of your properties?

A. Yes.

Q. Was there a ditch there?

A. Yes, there had been a ditch there. Whether we filled [167] it up or not, I don't know. I don't remember that.

(Testimony of Gordon Cameron.)

Q. Was that the way Elmer Shepard had gotten his water the previous year?

A. That is right.

Q. He had taken it outside the property?

A. That is right.

Q. How much more in terms of drilling does it cost to drill a 1,500 foot well than a 1,350 foot well?

A. Whatever your price is for the additional figure.

Q. What is your price?

A. Depending on the area.

Q. What would be the price you would have charged Mr. Otto for going from 1,350 to 1,500 in his new well?

A. Eight dollars, I believe it was.

Q. Is that per foot?

A. Eight dollars per foot.

Q. Did you notice a decrease in the Shepard well at the time Mr. Shepard was the owner of the property, at various times?

A. I can't remember. It might have decreased a little.

Q. At various times?

A. Yes, at various times when his bowls would get worn.

Q. Is it common, in your experience as a well driller, to find a situation when you are going in to deepen a well where a 15-inch bit will not go, a 12½ inch bit won't go, [168] and a drill collar that is 10 inches takes weight at a particular spot?

A. Well, we have run into that trouble before.

(Testimony of Gordon Cameron.)

Q. Am I right in thinking this, Mr. Cameron, that if that is the inner diameter of the casing, which would be 15 and a half inches in this case, that a 12 and a half inch bit would perhaps fit in about like that? (Indicating on diagram.) A. Yes.

Q. And a 10-inch drill collar about like that?

A. Yes.

Q. So that when a 10-inch drill collar takes weight at 450 feet, it means there is something sticking out that far from one side or the other into the well opening?

A. It could be a bridge.

Q. What is a bridge?

A. A sand bridge that will accumulate in a hole when you drill, which is frequent.

Q. Do you know of your own knowledge what happened to the very first well drilled on the Shepard property? A. I don't know.

The Court: We will suspend until ten in the morning.

(Thereupon, an adjournment was taken to the following day, Friday, May 18, 1956, at ten o'clock a.m.) [169]

Friday, May 18, 1956—10:00 A.M.

Redirect Examination
(Continued)

By Mr. Rehnquist:

Q. You are the same Gordon Cameron who has previously testified in this action? A. Yes.

(Testimony of Gordon Cameron.)

Q. How many bales to the acre did you make off your own crop last year, Mr. Cameron?

A. I think we made 218 bales off 95 acres.

Q. And it is your testimony if it hadn't been for the rain, you would have done half a bale an acre better? [170]

A. Well, that is what we think.

Q. When you deepened Mr. Shepard's well in December, 1953, was the formation material you went through in the deepening about the same as at the thousand foot level?

A. I believe it was a little coarser, coarser sand.

Mr. Burch: I beg your pardon?

The Witness: I believe it was a little coarser sand.

Q. (By Mr. Rehnquist): But it was generally sandy? A. Yes, it was sand.

Q. (Indicating on diagram): Is that a rough approximation of the way your land lies with respect to the Shepard property, those being the respective wells? A. Yes.

Q. Now, during the 1954 season when Mr. Shepard was still farming the property, was this area of yours down here in cotton, this southwesterly portion? A. 1954?

Q. Or did you later level that?

A. No, it was all leveled at the same time.

Q. And would that have been in cotton, this little corner down here?

A. One year it was, but I don't remember

(Testimony of Gordon Cameron.)

whether it was 1953 or 1954. 1953 it was, 1954 it was not.

Q. It was not? [171]

A. I don't believe it was.

Q. And when Mr. Shepard borrowed water from you that year, would they have taken water along the edge of the crop that way?

A. No, we didn't have any crop in there.

Q. I mean the crop in here. What I am trying to get at, would they have to go——

A. No, we had a little hill there.

Q. This past year you had leveled this land, and it was in cotton? A. Yes.

Q. So Mr. Otto, if he wanted to borrow the water, would have had to come all the way around here? A. That is right.

Q. (Indicating on diagram): All the way around here? A. That is right.

Mr. Rehnquist: We have no further questions.

Recross-Examination

By Mr. Burch:

Q. Mr. Cameron, I think you stated yesterday on direct examination that the obstruction you found when you started deepening the Shepard well, might have been a sand bridge. Do you recall that statement? A. That is right.

Q. What is a sand bridge? [172]

A. It is sand that accumulates in the well in different spots. It may be 20 feet thick, then 100 feet of water in another one. It can be any way.

(Testimony of Gordon Cameron.)

Q. How did you get rid of it?

A. You bale them out or drill them out.

Q. Are they serious obstructions?

A. No, they are not serious.

Q. Have you ever had any in your own well?

A. No.

Q. Have you ever had sand in your pipes in your well? A. Yes.

Q. What happens to it, ordinarily?

A. Well, it seems we have a strong flow of water at the bottom, and it will clean itself out if there is any sand left in it.

Q. Is that the same flow of water, apparently, the Shepard Well drew on? Was it?

A. Well, we think so.

Q. There was a strong flow of water available, then, to both the wells? A. Yes.

Q. When you pulled the casing from the Shepard well, was it necessary to use a hydraulic jack?

A. We used 200-ton hydraulic jacks.

Q. And what was the net effect? Were you able to pull [173] the casing out easily?

A. No. I think it took two or three days to get a footing under those jacks that would hold.

Q. Was the casing apparently packed in tight, then? A. Yes. Yes.

Q. Incidentally, in regard to your cotton crop, how long have you farmed that land of yours?

A. I think this is four years.

Q. And has the crop progressively gotten better each year? A. Yes.

(Testimony of Gordon Cameron.)

Q. That is the normal progress when you open up new land, isn't it? A. I think so.

Q. And the first year it is probably its worst crop of all, and your second year is better, just a little better, is that right? A. That is right.

Q. So last year there would have been the best crop you ever had off the land, is that right?

A. That is right.

Q. I think the Shepard property wasn't farmed as soon as yours, is that correct?

A. I think it was one year later.

Q. One year later? [174] A. Yes.

Mr. Burch: I wonder if the reporter would read to Mr. Cameron at this time a statement of Mr. Otto that I requested yesterday to be read to him.

(A portion of Ernest Otto's testimony on direct examination was read to the witness, as follows:)

"Q. (By Mr. Rehnquist): Had you spoken to Mr. Cameron before this conversation about the possibility of repairing the well? A. Yes.

"Q. What did Mr. Cameron tell you at that time?

"Mr. Burch: We make the same objections, hearsay.

"The Court: All right, go ahead.

"The Witness: Well, he come to the house that morning, and he said that he just decided he might as well lay the cards on the table and make it plain to me that I shouldn't try to repair that well.

(Testimony of Gordon Cameron.)

"He says, 'I don't care if I get the job or someone else gets it, but,' he says, 'I don't want you to spend five, six, seven thousand dollars working on that well, because,' he says, 'It is impossible to repair.'

"And I asked him what made him think so. And he kind of laughed, and he said, 'Well, I'm not thinking,' he says, 'I know.' [175]

"I said, 'How do you know?'

"He said, 'I was in that hole last year, and,' he said, 'that casing was broke or collapsed at that time when we went into the hole,' and he said, 'we put our drill into it and at 477 feet it stopped. So they pulled the bit out and put on smaller sizes,' and he said, 'they finally got. I believe it was, an 11 or 12-inch bit.'

"He said, 'They stayed there a couple of hours and drilled through the bad place. Then they went on down and deepened the well for Elmer. But,' he said, 'it was impossible to repair the well.'"

Q. (By Mr. Burch): Do you recall any such conversation, Mr. Cameron?

A. I never told anybody the casing was broke in two——

Q. Did you ever tell Mr. Otto it was impossible to repair the well?

A. I never told him it was impossible to repair the well.

Q. Did you ever tell him the well was collapsed? A. No.

Mr. Burch: That is all.

(Testimony of Gordon Cameron.)

Redirect Examination

By Mr. Rehnquist:

Q. Did you ever tell Mr. Otto it was not feasible, or not advisable to repair the well? [176]

A. I did.

Mr. Rehnquist: That is all.

Recross-Examination

By Mr. Burch:

Q. And in that respect, it was due to economic conditions, and not the condition of the well?

A. Well, the condition of the well, the sand and silt. I didn't think it was feasible.

Q. I think you stated that is the condition your own well is in that you were operating?

A. Yes.

Q. It was possible to repair the well?

A. You couldn't have took and put new perforations in.

Q. You could have put new bowls in?

A. Yes

Q. And you would have had an available water supply the same as always?

A. Yes, you would have.

Mr. Burch: That is all.

(Testimony of Gordon Cameron.)

Redirect Examination

By Mr. Rehnquist:

Q. And the bowls would have been constantly being worn down by the sand coming into the perforations, is that correct? A. Yes.

Mr. Rehnquist: That is all.

Mr. Burch: That is all. [177]

Mr. Rehnquist: Your Honor, may Mr. Cameron be excused?

The Court: He may be.

Mr. Burch: Mr. Cameron has asked if he may remain in the courtroom. We have no objection.

Mr. Rehnquist: We certainly have no objection.

The Court: All right.

(Witness excused.)

KENNETH G. BROWN

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Ragan:

Q. Will you state your name please?

A. Kenneth G. Brown.

Q. What is your address?

A. 5322 Culver, Phoenix.

Q. How long have you lived in Arizona?

A. A little over 8 years.

Q. What is your occupation now?

(Testimony of Kenneth G. Brown.)

A. I am superintendent for Roscoe Moss Company.

Q. In Arizona? A. Yes.

Q. What is the Roscoe Moss Company?

A. We are water well contractors.

Q. Does that mean you drill water wells? [178]

A. Yes, sir.

Q. Does your duty include any other type besides water well drilling?

A. No, just water wells.

Q. Have you been in that position since you have been in Arizona for the last 8 years?

A. Yes, sir.

Q. What is your general education, Mr. Brown?

A. I have a Bachelor of Science in Mechanical Engineering from the California Institute of Technology.

Q. When did you receive that? A. 1944.

Q. What was your work career after that date?

A. I was in the Navy until 1946, and I left the the Navy and joined Roscoe Moss Company in Los Angeles, and worked there for about a year and a half until I was sent over here in February, 1948.

Q. While you were over there, in what capacity were you employed?

A. I was in an engineering office of the company.

Q. Since you have been here for 8 years as superintendent of the Arizona operations of the well company, what has your job consisted of, its duties?

A. Well, the direction of the operations of our

(Testimony of Kenneth G. Brown.)

drilling equipment, and the contact with customers, setting up of contracts, [179] the general overseeing of the entire operation here.

Q. Do you supervise the drilling of the wells themselves? A. Yes, sir.

Q. In this connection, are you familiar with the operation of pumps, pumping wells?

A. In a general way. We don't handle pumps directly.

Q. Not directly? A. No, sir.

Q. Are you familiar with the Report of Well Driller and Log of Well required to be filed by the State for wells drilled in this state?

A. Yes, sir.

Q. I would like to show you Plaintiff's Exhibit 13, which describes a well drilled on the Section 21, Township One North, Range 9 West, in Maricopa County, a well completed on 10/6/52. Note the Log on the back.

I would also like to show you Plaintiff's Exhibit 12, which is a well drilled on the same property, and containing a Log on the back as to the Formation Material. I would like you to familiarize yourself with the Formation Material and the construction of this well described in Exhibit 12.

I believe it will show that it is a well 1,033 feet deep, with 20-inch casing the first 400 feet, and 16-inch outer diameter casing from 400 to 1,033, perforated all the way, is that right? [180]

A. Right.

Q. Looking again at the formation material as

(Testimony of Kenneth G. Brown.)

described on that Log in Exhibit 12, I would like to ask you if that contains sufficient information for you to form an opinion as to the type of ground or earth along the length of the well?

A. Yes, sir.

Q. Are you familiar with the drilling of wells in such type of formation material?

A. Yes, we have drilled in similar formations.

Q. I take it you drilled Rotary drilled wells, as well as Cable tool drilled wells? A. Yes.

Q. Now, assume, Mr. Brown, the well described in Exhibit 12, which is the well completed on or about May 7, 1953, assume that in the 16-inch outer diameter casing a 15-inch bit was placed in there, and that at approximately 477 feet it hit something and it would not go past that point.

Then a 12¼ inch bit was placed in the 16-inch casing, and it would not go past 458 feet.

Then a drill collar 10 inches in outer diameter was started down the 16-inch casing, and it took weight at 458 feet, and an impression block is put in the hole, brought out, and the driller goes back in with a 12¼ inch bit and drills through the bad place, and goes on to the bottom. Do you have an opinion as to what constituted the obstruction in the well [181] which I have described?

Mr. Burch: We object to the question on the grounds there has been no foundation laid for this man to have any opinion as to what was the obstruction in the well, merely by looking at State records, if the Court please.

(Testimony of Kenneth G. Brown.)

The Court: He may answer.

Q. (By Mr. Ragan): Do you have such an opinion? A. Yes.

Mr. Burch: We object again for the same reasons.

The Court: Go ahead.

Q. (By Mr. Ragan): And what is your opinion?

A. My opinion would be that the well had collapsed at that point, the 455 foot point, and that when the bit was put back in and was rotated to go through that, it would, my opinion would be they would drill the side off of the obstruction at that point.

Q. You mean a side off the casing?

A. Of the casing, yes.

Q. That would leave a break?

A. An opening.

Q. Assuming that is the fact, Mr. Brown, what would happen in the future? What would you expect to happen, as far as the activity of the formation material in that area?

Mr. Burch: Same objection heretofore made. Also that [182] it is speculative, if the Court please, and no foundation shown for this man to testify to that.

The Court: Objection overruled.

Q. (By Mr. Ragan): I think I will ask you to step to the board, Mr. Brown, and if you will draw a picture, a diagram of the well, so we can see the activity of the earth at that point.

A. (Witness draws diagram): In a general way,

(Testimony of Kenneth G. Brown.)

this is the surface of the ground, and your well is drilled into the ground in such a fashion with a static water level at some point.

When the pump is inserted in the well, and commences evacuating groundwater from the well, it withdraws down the level of the water inside the casing to some point lower than that of the groundwater outside of the casing, and over a period of time generally a cone is formed called the draw-down cone.

In other words, the head of the water inside the casing is this many feet lower than that that the groundwater would normally assume. Therefore, that causes the water to enter the well with a certain velocity, the velocity of the water entering depending upon the draw-down and the porosity of the formation surrounding the casing.

Well, then, if you have, in other words, this water entering with a certain velocity has a tendency to pick up [183] the particles of earth, or whatever it may be, which surrounds it.

The casing and the size of the particles which will then enter the well are, of course, dependent upon that entrance velocity and the size of the openings. So that in this case, if the drilling past the obstruction were to create a larger opening than had been put in there, the perforations that had been put in the well at the time of drilling, particles of larger size could very easily enter the well.

Q. Assuming they did, where would they go, Mr. Brown?

(Testimony of Kenneth G. Brown.)

A. In the case that you have outlined where the well was 20 inches in diameter for 400 feet, reduced at that point, and the pump bowls were set above the reduction, I would guess that the larger diameter particles would fall to the bottom of the well.

Q. What is the effect of a well having particles fall to the bottom of it?

A. Well, the effectiveness of a well is that as you reduce the head inside of the casing, as opposed to the head which exists outside the casing, this difference in head exists over the whole length or depth of the well, which permits, which means that at that point, regardless of the depth, there is a greater head outside of the casing than there is within it, the water tends to fill the void, go to the point of lower head. [184]

However, as the well tends to backfill through the dropping of particles, sand, whatever it might be, that effect is lost. The difference of head no longer exists, because the water cannot flow into the well and then flow readily up into the sand which has been deposited, so, in effect, you lose the effect of that depth of well.

Q. Relating to the perforations, we have assumed in this question this well was perforated from 400 feet to 1,033 feet? A. Yes.

Q. What is going to be the effect on the area from which you can draw water?

A. As the well backfills?

Q. Yes.

(Testimony of Kenneth G. Brown.)

A. Well, the effective depth of the well will be just reduced by the amount of the depth that is backfilled with sand.

Q. Will that have any effect on the amount of water it is capable of producing, the well?

A. Yes, it will, if this area in question was producing water. If the area in question was dry, the well would have no effect. If the well was dry, you would lose the effect of that area.

Q. You may take your chair again.

Assume this same well, Mr. Brown, which we have described as cased to 1,033 feet, and assume it is deepened to [185] 1,375 feet, that the deepened area is of a coarse sand formation, and that the deepened area is not cased.

Do you have an opinion as to how long the deepened area will be available as a part of the depth of the well?

Mr. Burch: We make the same objection. No foundation laid, purely speculative.

The Court: He may answer.

The Witness: Yes.

Q. (By Mr. Ragan): What is your opinion?

Mr. Burch: Same objection, for the record.

The Court: He may answer.

Q. (By Mr. Ragan): What is your opinion?

A. If the area in question, the uncased area of your well was a yielding area, in other words, if the formations encountered through this deepened portion which were not cased were capable of yield-

(Testimony of Kenneth G. Brown.)

ing water in general, they will not stand up for any great length of time without casing.

The velocity of the water entering tends to break down the side wall, and in time you lose that deepened portion.

Q. Referring again to the type of material formation we have described here, do you have an opinion as to whether a well in this type of formation would pump sand? [186]

Mr. Burch: We make the same objection. No foundation laid.

The Court: He may answer.

The Witness: Yes.

Q. (By Mr. Ragan): And what is that opinion?

Mr. Burch: Same objection, for the record.

The Court: Same ruling.

The Witness: Yes, the Log is the type that one would expect that the well would yield a certain amount of sand along with this water.

Q. (By Mr. Ragan): And when the sand does come into the well, to come out, in the final analysis, does it all come out?

A. You mean, is it all pumped out?

Q. Yes.

A. No, not necessarily. Again that depends—may I refer to this again?

Q. Yes.

A. (Witness refers to diagram): Depending on the point where the sand enters the well, and the velocity of the water, in other words, your maximum velocity within the casing will be achieved at the

(Testimony of Kenneth G. Brown.)

point where the water enters the bowls. [187] Below that point successively down the well, the velocity will be less, because at the bottom a minimum amount of water enters.

As more water enters the well, the velocity picks up inside the casing, so at some point, depending on the velocity of the water and the size of the particle involved, it will, if it enters below the critical velocity point, it will drop to the bottom, taking any certain size particle. Above that point, if the velocity of the water is sufficient to carry it, it will enter the bowl and drop out.

Q. It will have the same effect of filling up the well as you have described?

A. Yes, it will go to the bottom and gradually fill your well up.

Q. I would like now to show you Plaintiff's Exhibit 10, Mr. Brown, which is a group of statements for repair to a well engine and pump, and beginning with the statement dated 7/22/53, I would like for you just to glance through or read through, and noticing the repair to the well itself, in terms of the bow's? A. Yes.

Q. Now, assuming a well in which there was a pump, and that pump required the repair which you have just looked at to its bowls, do you have an opinion as to whether that reflects a sand condition, or not? A. Yes. [188]

Q. Do you have an opinion as to whether it is an excessive or mild sand condition?

Mr. Burch: If the Court please, we will object

(Testimony of Kenneth G. Brown.)

again. No foundation for this witness to testify as an expert. He admits his own company doesn't handle pumps. Now, they are calling for his opinion on pump repair based on some bills before him, without any other fact in evidence.

The Court: Why don't you get a pump man. The witness says he doesn't know anything about a pump.

Mr. Ragan: All right. Fine.

Q. (By Mr. Ragan): Assuming, Mr. Brown, a well as originally described to you in the Exhibit 10, I believe it is, or Exhibit 12, is that right?

A. Yes. The second well?

Q. Yes. And assuming further the fact that it was re-entered in December of 1953, with the history of the break which you said, in your opinion, occurred, and the deepening, the uncased deepening, and the formation material generally there, do you have an opinion as to whether or not such a well in that condition was a good or bad well?

Mr. Burch: We are going to object again. No foundation laid.

The Court: You may answer.

Can you answer that, whether it is a good or bad well? [189] What do you mean by good or bad?

Mr. Burch: Not unless he is clairvoyant.

Q. (By Mr. Ragan): As to the equipment in the well, do you have an opinion whether it was?

A. What do you mean by the equipment in the well. The casings?

Q. Yes.

(Testimony of Kenneth G. Brown.)

A. Yes, I have an opinion on that.

Q. What is that?

A. Well, certainly, the fact that the well has collapsed and was then drilled out, why, certainly it isn't going to benefit the well.

Mr. Burch: If the Court please, we move that be stricken. He says "the fact that the well has collapsed." He is testifying to his own opinion as a fact. Certainly it isn't responsive to any question.

The Court: All right.

Q. (By Mr. Ragan): Mr. Brown, assuming that a well had a capacity of 2,000, 2,200 gallons per minute at the end of a growing season. Assume the year 1954, around October. That that well was then not used until April of 1955, when it was turned on at the next growing season.

Do you have an opinion as to whether or not [190] the capacity should or should not be the same at that time? A. Yes.

Q. And what is that opinion?

A. In general, the well will be as good or better. They oftentimes are better at the commencement of a growing season because of the standing water level, which tends to rise in winter when wells are not pumped, so as a general rule they are as good or better.

Mr. Ragan: That is all.

(Testimony of Kenneth G. Brown.)

Cross-Examination

By Mr. Burch:

Q. Mr. Brown, in your business, do you ever take and use an impression block?

A. Yes, frequently.

Q. What purpose does that serve?

A. The idea of the impression block is to, when you have an obstruction in a well, is to lower this block which has got a greased pad beneath it, you lower that down into the obstruction in question to attempt to determine just what it is.

Q. Will it show a well that is collapsed?

A. Not always. In fact, in collapse, usually not. In order for an impression block to make an impression, you have to have something sharp to indicate.

Q. That would be a break in the well wall?

A. Yes, a break is something—you couldn't expect to find [191] collapse. Not ordinarily.

Q. Are you familiar with a sand bridge?

A. Sand bridges, you mean, through the gravel?

Q. Yes. A. Yes.

Q. Does that occasionally occur inside a well?

A. Quite frequently in a Rotary well a sand bridge will occur.

Q. Is that in the nature of a collapse?

A. No, a sand bridge is through the gravel back here, the sand will bridge through the gravel and prevent the gravel from actually filling the void that is created (indicating on diagram).

(Testimony of Kenneth G. Brown.)

Q. That is on the outside?

A. That is on the outside of the casing.

Q. Did you ever get a sand bridge inside the casing?

A. Yes, not frequently. I have seen a couple.

Q. What do you do for those?

A. At the time when you go back and clean out the well, you knock them out.

Q. How do you knock them out?

A. We use a scow on a cable tool rig.

Q. Is that drilling them out?

A. That is in effect drilling them out.

Q. If there was a sand bridge in there, it could well [192] occur that would obstruct the drill, wouldn't it? A. Yes, it is possible.

Q. And if a well driller with years of experience said it might have been a sand bridge in there, that well might have been what happened to it, as well?

A. Yes, it is possible.

Q. When you speak of the collapse of a well, do you mean the whole internal piping the pump is set in collapses?

A. Generally what happens to cause a collapse is that the formation surrounding the well, if you pump sand, tends in time, as you pump that sand, to create a void outside your casing, and as this void is created, it then leaves the formations above the sand unsupported, and oftentimes as those formations eventually cannot support their own weight, they give way, and they fall against the casing, will not completely collapse it. They tend to dent it.

(Testimony of Kenneth G. Brown.)

Q. Then this casing, instead of having collapsed, may have been dented, is that correct?

A. Yes. By collapse, you see what I meant. I didn't mean a complete closure.

Q. It might have been an indentation in the side of the casing? A. Possibly.

Q. That was possible. You noticed on one of the reports that the first bit that went down went to 470 some odd feet, [193] did you notice that?

A. I don't believe it is on these as reports.

Q. Then if I give you as a fact that the large bit first went to 477, and the smaller bit later stuck at 458, would that have any significance to you? A. A large diameter bit?

Q. The first passed this point where you have stated in your opinion a collapse occurred.

A. And then later it would not go to that depth again?

Q. The smaller bit then indicated there was pressure on that point, took on weight at that same point. A. At the same point?

Q. 455 as, say, opposed to 478, or some such thing. A. I would be puzzled by that fact.

Q. If I tell you that is a fact, would that change your mind as to the certainty that there was a collapse in this well?

A. It is difficult to answer that without having further facts.

Q. Have you ever drilled any wells in the Harqua Hala Valley? A. No, sir.

Q. Your company ordinarily uses a cable rig?

(Testimony of Kenneth G. Brown.)

A. We are primarily cable tool operators.

Q. And this was a rotary well drilled we are talking about? [194] A. Yes.

Q. A rotary well.

A. We do less of rotary than we do cable.

Q. If I told you a well was drilled at approximately this same location with this same formation, and produced clear water instead of sandy water, would that change your opinion in any respect as to the sand formation, and the possibility of collapse?

A. No, sir.

Q. Why will one well produce clear water and another silty water in the same location?

A. That is a difficult question to answer. We have seen it happen many times over, wells that may be separated as little as 100 feet. I am not sure of the answer.

Q. If a well produces sand for a short time upon operation, and then clears up, what does that indicate?

A. That is a normal procedure. Nearly any well will produce sand for up to a couple of hours.

Q. If that is the case of this well after having been in operation for a number of hours, it clears up, it would be perfectly normal?

A. Depending on the number of hours. I would say a perfectly normal well in Arizona should clear up within four to six hours. Over that you begin to wonder a little.

Q. You say it would be normal for any well to be a little [195] better producer in the beginning of the

(Testimony of Kenneth G. Brown.)

growing season than at the end of the last pumping season, is that true? A. As a general rule.

Q. If I told you that this particular well at the end of the 1954 season was producing water sufficient for about 55 tubes, 2-inch tubes, at the heavy end of the growing season when it required concentrated doses of water, then was able to produce about 72 2-inch tubes at the beginning of the next season, would you say that was in good condition?

A. Yes, from that I would say so. I would say that would indicate the well was pumping more water.

Mr. Burch: That is all.

Redirect Examination

By Mr. Ragan:

Q. Approximately how many rotary drill wells have you been connected with, Mr. Brown?

A. I would have to make a guess. Our equipment is in and out.

Q. A number? A. Oh, thirty.

Mr. Ragan: Thank you. That is all.

Mr. Burch: One additional question.

(Testimony of Kenneth G. Brown.)

Recross-Examination

By Mr. Burch:

Q. I want to specifically tie this down, Mr. Brown. [196] Speaking of the well of which you testified there was a possibility of a dent or a collapse, and if that well used 72 2-inch tubes at the beginning of one growing season, whereas it had only used 55 at the close of the previous season, would you say that well was collapsed?

A. I couldn't answer that.

Q. The production would be that of a normal well that was in good repair?

A. The collapse will oftentimes not have any effect on the production of water, in that it won't completely close the casing.

Q. A collapse is not necessarily a lost well?

A. No.

Q. And if this well was able to produce 72 2-inch tubes in the beginning of the season, as against 55 at the close of the season, would you say it was in good producing condition?

A. I would say it was producing. As to the state of the repair, I have no way of knowing.

Mr. Burch: That is all.

Mr. Ragan: May this witness be excused?

The Court: He may be.

(Witness excused.)

ELMER F. SHEPARD

called as a witness in behalf of the Plaintiffs, having been previously duly sworn, testified further as follows: [197]

Cross-Examination
(Continued)

By Mr. Rehnquist:

Q. You are the same Elmer Shepard that has previously testified in this action? A. Yes.

Q. Did you in response to a subpoena bring with you gravel receipts pertaining to the well that was on your property at the time you sold it to Mr. Otto? A. I did.

Q. Could I see them, please?

A. Yes. (Handing to counsel.)

Mr. Rehnquist: May these be marked.

The Clerk: Plaintiff's Exhibit 15 for identification.

(Said documents marked as Plaintiff's Exhibit 15 for identification.)

Q. (By Mr. Rehnquist): Handing you Plaintiff's Exhibit 15 for identification, was all that gravel used on this particular well that we have been discussing? A. Yes.

Q. And are those all the receipts you have for gravel used in that well? A. I believe so, yes.

Q. That represents all the gravel thtat was put into that well? [198] A. I believe so, yes.

Q. That represents all the gravel that was put into that well? A. That is right.

Q. The first sheet here, you will notice, bears

(Testimony of Elmer F. Shepard.)

dates of 6/2/53, and 6/3/53. That would be for gravel put in in June, 1953?

A. May and June.

Q. May and June?

A. That was what was aded. That was another bill there.

Q. I am going to go through them all. And their second sheet here bears date of 5/8/53. That would be for gravel that was put in in May of 1953?

A. Yes.

Q. And the last sheet here bears dates of April 28, 1953, that was gravel put in in that month, is that correct?

A. That is 152 tons that was put in when the well was drilled.

Q. 152 tons when the well was drilled, and then this 5/8/53, that is 12.9 tons, is that correct?

A. That was added the next month.

Q. And then 13 tons Well Rock, and 12.7 tons Well Rock. A. Was added in June.

Q. In June. A. That filled the well. [199]

Q. And you never had any more gravel added to that well from June, 1953, until November, 1954, is that correct?

A. It was impossible. The gravel chute filled up, but we had gravel on the place to fill it, if it was necessary, but we assumed it was full, because it didn't take any more.

Q. You never added any more gravel?

A. It was impossible to add it.

Q. Am I correct in saying you did not add it, if

(Testimony of Elmer F. Shepard.)

it was impossible to add it? A. That is right.

Mr. Burch: Those never did get in evidence. We have no objection.

Mr. Rehnquist: That is right. I will offer them in evidence.

The Court: They may be received.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Said documents received in evidence and marked as Plaintiff's Exhibit 15.)

Q. (By Mr. Rehnquist): Mr. Shepard, calling your attention to Plaintiff's Exhibit No. 2 in evidence, is that your wife's signature? Take a look at it. A. As far as I know, it is.

Q. Do you know that she signed this?

A. Yes. [200]

Q. And that is her signature, then?

A. Yes.

Q. Mr. Shepard, what did you do with this property between the time that you entered into this Option Agreement in November, 1954, and the time that you sold it to Cal-Nine in January, 1955? Did you continue to use it?

A. No, I think we started up one time when Mr. Otto and his brother-in-law was on the property.

Q. That would have been in November, 1954?

A. I don't remember what month it was. It was when we was running the picking machines. That was the last time it was ever started.

Q. And that was at the time of this conversation

(Testimony of Elmer F. Shepard.)

you have previously described and heard Mr. Otto describe, is that correct? A. Yes.

Q. And the well was not started after that?

A. No.

Q. Did you retain possession of the property?

A. Naturally I did, until they took possession. It was about 30 days later. They were supposed to have taken possession February 1st.

Q. When did they actually take possession, if you know? A. Along in March.

Q. Did you request them to delay this taking possession? [201]

A. No, they were having some kind of trouble in California, I understand.

Q. That was not done at your request, then, that delay? A. No.

Q. So far as you were concerned, you were willing to turn the property over to them at any time they wanted it?

A. Any time they wanted it. February 1st was the date I was to give possession.

Q. And they had already paid you the payment called for at that time, had they not? They paid that at the time the Escrow Instructions were made?

A. Sometime in January, I believe.

Q. It was not at the title company, then, that they paid that? A. Yes.

Q. When you talked to Mr. Otto and Mr. Haas in November, 1954, this time that you had your cotton picking machines running, you knew Mr.

(Testimony of Elmer F. Shepard.)

Otto was not putting up the money by himself, didn't you? A. The first time I talked to him?

Q. No, at the time in November of 1954 when you had the conversation out by your pump.

A. I didn't know but what Otto was furnishing the money at that time.

Q. Did you know that Mr. Haas was interested in the property? [202]

A. I heard that they were to have several partners, maybe he was trying to raise the money to buy the place. I didn't know who.

Q. You had heard that Mr. Otto was not going to raise all that money himself, isn't that right?

A. No, not at that time. I didn't know what the situation was.

Q. I thought you just said you heard he was going to have several partners?

A. I did later.

Q. When did you hear that?

A. When we were drawing up the Option.

Q. That was in November of 1954, in Mr. Towner's office? A. Yes.

Q. You knew at that time, then, that Mr. Otto might be bringing several other people into the deal?

A. He was trying to bring several others.

Q. And you had no objection to that, I take it?

A. I don't see why I should.

Q. And you had no objection in January, 1955, to Cal-Nine Farms exercising this Option that had been granted to Mr. Otto and Mr. Haas personally?

(Testimony of Elmer F. Shepard.)

A. No.

Q. So long as they paid the money, that was all you were interested in, is that correct? [203]

A. That is right.

The Court: We will have our morning recess at this time.

(The morning recess was taken.)

The Court: You may continue.

Mr. Rehnquist: We have no further questions at this time.

The Court: That is all.

(Witness excused.)

Mr. Rehnquist: We will call Robert Lanford.

ROBERT L. LANFORD

called as a witness in behalf of Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Robert L. Lanford.

Q. Where do you live? A. Palo Verde.

Q. Where is Palo Verde?

A. It is about 7 miles west of Buckeye.

Q. What is your occupation, Mr. Lanford?

A. Field man.

Q. For whom?

A. Fannin's Gas & Equipment Company.

(Testimony of Robert L. Lanford.)

Q. What does it mean to be a field man for Fannin? [204]

A. Well, you travel around and see different farmers in the country there. I mean, it has to do with the sale of fertilizer and insecticide.

Q. You make trips to farms in the area, and make inspections, is that correct?

A. Yes, at times, yes.

Q. How big an area do you cover in your trips?

A. My area is from west of Buckeye, just as far west as I want to go there, usually around from Gila Bend, out Harqua Hala, and that district.

Q. Was that also your area last year?

A. Yes.

Q. About how many cotton farms did you have last year?

A. I wouldn't know definitely offhand. There were several of them. I wouldn't know definitely the exact number.

Q. Did you have occasion last year to visit the ranch operated by Mr. Otto? A. Yes.

Q. And what was the purpose of your visits to that ranch?

A. Well, at times there I sold him some fertilizer alone, and then later on I checked the fields for insects.

Q. About how often did you make those checks for Mr. Otto? A. About once a week.

Q. Did you inform him of the results of your checks? A. Yes. [205]

(Testimony of Robert L. Lanford.)

Q. Are you acquainted with the number of times Mr. Otto dusted for insects last year?

A. Not offhand I wouldn't know just how many.

Q. What is your educational background, Mr. Lanford?

A. Well, I went to grammar school, high school course, then I went one semester to the University of Arizona, then three years to Arizona State College at Tempe.

Q. What did you major in?

A. Agriculture.

Q. And you took agricultural courses at the Arizona State at Tempe? A. Yes.

Q. Are you familiar with the state of Mr. Otto's cotton crop as it went through last season?

A. Fairly well familiar, I suppose.

Q. And if you assume as a fact that he dusted four times for insects last year, would that in your opinion be an adequate number of times?

Mr. Burch: I think we will object to that. There is no foundation laid to show that this man knows how many times it is necessary to dust a crop, if the Court please.

The Court: He may answer.

The Witness: Well, it would be hard to say. I mean——

The Court: If you can't say, say you can't. [206]

The Witness: I can't say, then.

Q. (By Mr. Rehnquist): Let me put it this way. In your opinion, did Mr. Otto fail to dust a

(Testimony of Robert L. Lanford.)

sufficient amount of times if you assume he dusted four times?

Mr. Burch: If your Honor please, he has already said he can't say.

The Court: Yes, I think so.

Q. (By Mr. Rehnquist): Did you observe Mr. Otto's cotton crop around the first of June?

A. Probably so, within a few days one way or the other.

Q. In your opinion did you have a good crop in the making at that time?

A. Yes, it looked good early there.

Q. Did you have occasion to observe it around the first of July, or thereabouts? A. Yes.

Q. And did he have a good crop in the making, or apparently so, then? A. Yes.

Q. And did you have occasion to observe Mr. Otto's crop in August, 1955? A. Yes.

Q. Did it still appear to be a good crop? [207]

A. Well, yes. Most of the time there I would say there wasn't anything wrong with it. It looked fairly good.

Q. How about around the first of September?

A. It didn't look too good at that time, as I remember.

Q. And from your knowledge of that crop, did you have an opinion as to what the decline in appearance would be due to?

Mr. Burch: I think we will again make the same objection. No foundation that he knows what caused it.

Mr. Rehnquist: He testified he has seen it once

(Testimony of Robert L. Lanford.)

a week all during the summer, and he is a graduate of an agricultural school.

The Court: All right, go ahead.

The Witness: What was the question again?

Q. (By Mr. Rehnquist): Do you have an opinion as to what caused the decline in Mr. Otto's cotton prospects last year?

A. Yes, I could probably make—there would probably be several things there that would cause that. There was one thing there, it came from rains there and washed out some ditches, and I would say the general appearance of the crop there showed lack of water, now. I guess that would be the answer to it, it showed lack of water there.

Mr. Rehnquist: I have no further questions.

Cross-Examination

By Mr. Burch: [208]

Q. You say the crop looked good in June, July, and August, is that correct?

A. I believe so, I don't know definitely. Sometime in August there it may have shown some water stress there, but I don't know definitely the date on it there.

Q. When did you first observe the crop?

A. Well, as a rule I tried to go out there at least once a week, and it was sometime after it came up, of course, there, probably, say, in, oh, May, something like that.

Q. From May to August you never observed any water shortage on the crop, is that correct?

(Testimony of Robert L. Lanford.)

A. I don't believe so.

Q. And the damage to the crop appeared after the heavy rains out there, is that correct?

A. Yes.

Q. That damaged a number of the crops in the area, didn't it? A. I believe that is true.

Q. Mr. Otto still produced a crop on the property, is that correct, even though it was damaged?

A. Yes.

Q. Are you able to determine how much of the damage was caused by water shortage, and how much by rain damage?

A. No, I really couldn't say on that.

Q. Did you ever observe Mr. Otto refurrow that crop [209] after the rains?

A. I believe he did there, because at one time when the cotton was up pretty big there, he was in there after a rain trying to refurrow it out. It looked pretty big, but of course he was trying to get the rows in there to do it.

Q. Subsequently, there was rain again after that attempt, or was that the last rain?

A. I couldn't say.

Q. You don't know what the final status of the crop was, whether it got furrowed out or not?

A. No, I couldn't say.

Mr. Burch: We have no further questions.

Mr. Rehnquist: No further questions.

(Witness excused.)

Mr. Rehnquist: We will call Mr. Makin.

MARK MAKIN

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Mark Makin.

Q. Where do you live, Mr. Makin?

A. In Buckeye, Arizona.

Q. You are here in response to a subpoena, is that correct? [210] A. That is right.

Q. What is your occupation, Mr. Makin?

A. I am salesman for the Rainbow Packing Company.

Q. What was your occupation during 1954?

A. Well, I was working for Elmer Shepard, and also for Safeway in 1954.

Q. And what was the nature of your work for Mr. Shepard?

A. I was farming his desert lands in Harqua Hala Valley.

Q. Were you an employee of Mr. Shepard's?

A. That is right.

Q. He paid you straight salary?

A. Yes, sir.

Q. Was there any partnership arrangement?

A. No, there was no partnership arrangement.

Q. You never had any partnership arrangement?

A. No, never had any partnership arrangement.

(Testimony of Mark Makin.)

Q. What amount did Mr. Shepard pay you?

A. He paid me $60 a week.

Q. And you had occasion to irrigate for him during the summer? A. That is right.

Q. Calling your attention to that summer of 1954, what was the greatest number of 1½-inch siphon tubes you were able to run that summer?

A. Well, I run 65, between 65 and 70 1½-inch and 2-inch tubes. [211]

Q. What do you mean when you say 1½ and 2-inch tubes?

A. I had a few 2-inch tubes. I used those in order to push the short rows on down and make them run even all the way across.

Q. How many 2-inch tubes were there?

A. Oridinarily four or five.

Q. The rest were 1½-inch tubes? A. Yes.

Q. Do you recall the head at which you ran them? A. I am not with you.

Q. Well, the depth below the water level in the ditch.

A. I regulated them so they would all try to get out about the same time.

Q. And you had occasion, I suppose, to use the pump at that time? A. I serviced the pump.

Q. And was there a bonnet on it at that time?

A. Yes.

Q. And was there a—do you know if there was a flange on the bonnet at that time?

A. That is right, because I helped put it in there.

(Testimony of Mark Makin.)

Q. When did you do that?

A. Well, I have a book here that I kept on the place at the time. I will give you the dates when it was made. I had this flange made by the Lancey Welding Company on the 2nd, 12th, [212] 54.

Q. Could I see that?

A. "Welded head for discharge pipe."

Q. That was the date you welded it in?

A. We did it within a few days after that.

Q. Who helped you with that?

A. Woody Woods.

Q. Do you know his full name?

A. Woody Woods is all I know.

Q. Did you make these records at the time you did the work? A. That is correct.

Q. Did Mr. Shepard request you to make those records?

A. No, he didn't. I did it for my own use.

Q. How long did you work for Mr. Shepard that summer?

A. I worked for him from January until around the first of September.

Q. Did you work up until the first of September?

A. It was around the last part of August, the first part of September. I don't have the exact date on that. I don't know.

Q. Mr. Makin, with respect to these siphon tubes, were they going at a pretty good rate when you were running 65 to 70?

A. Well, we tried to even them up and make them all run [213] about the same.

(Testimony of Mark Makin.)

Q. Were they putting out a normal amount of water, normal amount of flow?

A. That is right.

Mr. Rehnquist: We have no further questions.

Cross-Examination

By Mr. Burch:

Q. Mr. Makin, I think you said this was in February, 1954, that you and Woods welded on the bonnet and flange, is that correct?

A. Yes, sir.

Q. What was the purpose of this bonnet?

A. To direct the water directly into the weir box. It was a small weir box, and at the time we didn't know which way we was going to face the discharge pipe, so I had made it north and south, and I had—and it was going into the narrow side of it, so therefore we put the bonnet on there to direct it into the weir box.

Q. What would happen if that bonnet was not on there?

A. It would have gone clear out over the weir box, because the discharge pipe was setting approximately three inches below the top of the weir box.

Q. You say the flange was put in at the same time, is that correct? A. Yes. [214]

Q. Why did you put that in?

A. In order to put a back pressure against the heat exchanger, and also against the gearhead. We had been having some trouble about the gearhead heating up, and we were trying to correct that.

(Testimony of Mark Makin.)

Q. Where did you get that idea from?

A. From Lyman Miller of State Tractor.

Q. Did he suggest such a device at the time?

A. Yes, he did. He suggested we go between your gearhead and heat exchanger and put a ¾-inch pipe in there in order to put a back head in there, in order to get better circulation through the gearhead.

Q. Now, why didn't you follow that procedure?

A. At that time I talked to Elmer about it, and he said we better not at that time, so I did the next best thing.

Q. Did Mr. Shepard request you to put this flange in there?

A. No, he didn't know it for some time. He found out accidentally.

Q. Did it serve the purpose?

A. Yes, it did.

Q. Why was it necessary to put that in? Didn't you have a butterfly valve on it?

A. Yes, we did. On those handles we pull over to put pressure against that, the packing was loose across the top of [215] it, and the water was squirting all over, and in order to take care of that, we put this flange in there, and it served the same purpose.

Q. You were still on the property when the pump was pulled in 1954, is that correct?

A. Yes, sir.

Q. Did you have any occasion to sound the well at that time and see what its depth was?

(Testimony of Mark Makin.)

A. Yes, sir, I did.

Q. Do you recall when that was done?

A. On the 7th and 29th days of 1954, I bought three balls of twine, and they run between 275 and 300 feet. I checked for 300 feet, so I don't know, between 275 and 300, and we put those three balls of twine on a spring approximately 18 or 20 inches long, and we lowered that into the well, and it took it all the way down without no obstruction at all.

Q. Did it hit the bottom? A. No, sir.

Q. Did anybody observe you doing that?

A. Elmer Shepard did.

Q. Anybody else? A. Not that I recall.

Q. Did either one of the plaintiffs, or Mr. Cameron, to your knowledge, know about that?

A. I don't remember on that. [216]

Q. You were familiar with the flow of water from that well in January, 1954, weren't you?

A. Yes, sir.

Q. And in the beginning of the growing season in 1954, that would have been about April when you made your pre-irrigation?

A. Let's see. I've got that, too. I started the water on April 11, 1954.

Q. And when was the last time you ran water on the property of 1954? A. Of 1954?

Q. Yes.

A. Well, it was the last part of August of 1954.

Q. That was after the bowls had been pulled and reset, is that right? A. Yes.

(Testimony of Mark Makin.)

Q. Was there any difference in the amount of water? A. Not that I could see.

Q. It seemed to be about the same, is that correct? A. Yes.

Q. Was there anything the matter with that well, to your knowledge, during 1954?

A. Not that I know of.

Q. Did it always produce about the same amount of water? A. About the same. [217]

Q. Do you know what they did to it when they had the pumps out and bowls out?

A. No, sir, I don't. I wasn't up there.

Q. Where did you get your water during that period of time?

A. Gordon Cameron volunteered to let us have the water, and we took it and irrigated our property while the well was being worked on.

Q. Did you have any trouble getting that water down from Gordon Cameron's? A. No, sir.

Q. How did you do that?

A. From his half-section we run a ditch on the side of the fence, and went on down and connected it with our ditch and went on irrigating.

Q. What was the condition of the water when you started up that well and pump, Mr. Makin?

A. Well, it would be just a little cloudy.

Q. How long did it take to clear up that situation?

A. Sometimes it would take 15 or 20 minutes. Sometimes three or four hours. It all depends.

(Testimony of Mark Makin.)

Q. Would it always clear up? A. Yes, sir.

Mr. Burch: No further questions. [218]

Redirect Examination

By Mr. Rehnquist:

Q. You say the output was constant during the time you worked there, Mr. Makin? A. Yes.

Q. Didn't the output decrease shortly before the pump was pulled in August, 1954?

A. Well, I can't say whether it did or didn't. I don't remember.

Q. You don't remember that it was constant right around there? A. No.

Q. It might have decreased?

A. I couldn't say.

Q. When did you start to work for Mr. Shepard? A. Around the first of January, 1954.

Q. Did you ever say to Mr. Otto there had been no flange in the discharge pipe at the time you worked there? A. No, I didn't.

Q. You never made that statement?

A. I never made such a statement.

Q. Do you know the reason for the pump being pulled in August, 1954?

A. I don't know exactly the reason for it, no.

Q. Was it at your request it was pulled?

A. No, sir. [219]

Q. Whose request was it?

A. Elmer Shepard's.

Q. You didn't participate in the decision to pull

(Testimony of Mark Makin.)

that? A. No, sir, I sure didn't.

Mr. Rehnquist: No further questions.

Recross-Examination

By Mr. Burch:

Q. I think you did state when you ran the last irrigation, there was no difference then than there was at the beginning of the season?

A. That is right.

Q. As far as production?

A. That is right.

Mr. Burch: That is all.

(Witness excused.)

Mr. Rehnquist: I call Mr. Haas.

HENRY HAAS

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. Henry Haas.

Q. Where do you live?

A. Fresno, California. [220]

Q. How long have you lived there?

A. All of my life.

Q. How old are you?

A. 45. Except for two years, I didn't live there.

Q. Are you a shareholder in Cal-Nine Farms?

(Testimony of Henry Haas.)

A. Yes, sir, I am.

Q. Are you an officer? A. Yes.

Q. What office do you hold?

A. Vice president.

Q. Did you have occasion to come to Arizona in 1954? A. Yes, I did.

Q. When was that, do you remember?

A. Well, it was in November. I believe we left Fresno November 15th.

Q. And did you come over with someone?

A. Came over with Ernest Otto.

Q. That is the Ernest Otto who has previously testified in the action? A. That is right

Q. What was the purpose of that trip to Arizona?

A. Well, he come over there in, I believe it was the end of October, and he said he would like to maybe buy a ranch over here, that is, the fellows he was picking cotton for thought it was a good buy, and this and that, and he wanted to [221] see about it, but he didn't have any money, I mean, actual cash, and a little short of it, so I says, well, maybe I can raise some. Therefore, I saw, oh, maybe a few of the fellows, four or five or six, and we decided, well, to put in a little money and help him buy it.

Q. And the purpose of the trip to Arizona was to actually effect the purchase of this land?

A. Yes.

Q. Or of some land?

A. Of some land, yes.

(Testimony of Henry Haas.)

Q. And did you have occasion while you were in Arizona in November, 1954, to have a conversation with Mr. Elmer Shepard? A. Yes, I did.

Q. And where did that conversation take place?

A. Well, it took place at his ranch right by the pump.

Q. Who else was present?

A. Ernest Otto.

Q. How did you happen to be out at the ranch?

A. Well, he had his cotton pickers going next door on the surrounding ranches, and we went out there and naturally had his workers there.

Q. Who is he? A. Ernest Otto.

Q. Continue. [222]

A. We stopped when we first got out there, we stopped where the boys were picking cotton, and he talked to his workers, and I was just standing around there and looking around, and this fellow Woody come up, and I believe he was hauling cotton, I mean, taking these trailers to the gin, and I just started up a casual conversation with him.

Q. Mr. Haas, I think right now it would be better if you would confine yourself to the details leading up to the conversation with Mr. Shepard. Did Mr. Shepard come up to you while you were on the property?

A. Yes. We were there about 10, 15 minutes, when he come up, driving up in his pickup.

Q. What happened then?

A. Well, Ernie introduced me to him, and we got to talking about his ranch.

(Testimony of Henry Haas.)

Q. Did he at that time turn on the pump?

A. Well, yes, we talked to him about possibly buying the place, but he says, well, we would like to see how this pump works, and how much water it throws. Therefore, he started the pump.

Q. What was the appearance of the water coming out of the pump?

A. To me it looked like a stream was coming out.

Q. Did you notice anything about the water?

A. Well, it was muddy, yes.

Q. Did either you or Mr. Otto make any comment about that to Mr. Shepard?

A. Ernie says, "Gee, that water is muddy."

Q. Did Mr. Shepard make any response to that comment?

A. He says, "Yes, that is the way these desert pumps are."

Q. Yes.

A. And after you run them a while, it clears up.

Q. Did Mr. Shepard at that time make any other comments or statements to you about the well on the property?

A. Yes, I believe Ernest asked him how many gallons of water it was throwing, and he said one of them ranchers out there, I believe Turner is his name, had estimated that 2,400 gallons a minute, but he said he estimated it at 2,200.

Q. Did he make any other statements about the well?

A. Well, yes. We got to talking around there,

(Testimony of Henry Haas.)

and at that same time one of these, oh, I believe one of them cotton pickers come up there, the mechanical cotton pickers, he was off a ways, and Ernie walked off a way to take a look at it, that was a different brand than he was running, and I says to Elmer, I said, "Man, that sure looks desolate out there, all this desert. If there was no water out here, it wouldn't be worth anything."

He said, "Well, I'll almost bet my bottom dollar you've got enough water here for a cotton [224] crop.

Q. And did he state the size of that crop?

A. Yes, he said he had over 200 acres, 211 or 20.

Q. What crop are you referring to, Mr. Otto, the one on the place at the time?

A. Yes, that was on the ranch there. Then I had also asked him, if this was such a good place, why he was willing to sell it?

Q. And what was his response to that?

A. Well, he told me he had a quite a bit of trouble with his eyes, and that I believe he said he went to the Mayo Clinic about that. I am not sure, and had them examined, and that these doctors had told him to stay out of excessive dust, and that road out in this Harqua Hala Valley is tremendously dusty, and therefore he was trying to sell the place.

Q. Did either you or Mr. Otto inquire as to any trouble he might have had with the well or pump?

A. Yes, he asked him about trouble, and this and that.

Q. And what did he state in response to that?

No. 15599

United States
Court of Appeals
for the Ninth Circuit

ELMER F. SHEPARD and KATHYRN SHEPARD, His Wife,

Appellants,

vs.

CAL-NINE FARMS, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-30-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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(Testimony of Henry Haas.)

A. He said he just had the ordinary trouble, the ordinary trouble.

Q. Did he go into any detail?

A. Not too much. He just said he had the thing fixed, and that is all I know about it.

Q. Did you have any later conversation with Mr. Shepard after you left the well site? [225]

A. Yes, we did.

Q. Where was that?

A. Well, we made arrangements to meet at the motel that night. I believe that was November the 17th.

Q. And did you meet at the motel that night?

A. Yes, we did.

Q. Who was present?

A. I was, and Ernest Otto, Elmer Shepard, this fellow Woody, Elmer brought Woody along. And there was also Ed Diebert.

Q. Who is Ed Diebert?

A. He was working for Ernie at the time. He was one of the fellows running the cotton pickers.

Q. Was there any conversation with Mr. Shepard about the well on the land at this meeting at the motel?

A. Well, yes, casual like. He was just more or less telling us it was good. Of course, my main purpose at the motel there was about money. It was about money we were supposed to put down on the Option. In other words, that was why I was here.

Q. Did Mr. Shepard state to you at that time that the well was in good condition?

(Testimony of Henry Haas.)

Mr. Burch: If the Court please, he has already gone into that.

The Witness: He assured us—— [226]

Mr. Burch: Just a minute. He is putting words in this man's mouth.

The Court: Oh, he isn't putting words in the man's mouth. Reframe your question. It is leading.

Q. (By Mr. Rehnquist): Did Mr. Shepard make any statement to you about the condition of the well?

A. He done that all along. I kept asking him all along. Naturally you would be worried about the water condition.

Q. What was that statement?

A. Well, he said the well was in perfect condition.

Q. Whose money was that that went into the Option payment, the $2,000?

A. Well, actually the money belonged to 8 fellows.

Q. And did they subsequently form the Cal-Nine Farms Company? A. They did.

Q. At that time, then, you contemplated that if the Option were exercised, it would be exercised by a corporation?

A. That is right. In fact, at the motel room there, why, Elmer thought $2,000 for the Option was not enough. He wanted 5,000.

So, I told him I couldn't give him 5,000. Actually, I had my own money, I could have given it to

(Testimony of Henry Haas.)

him, but I says I wouldn't do that, because each fellow was putting in his share.

In other words, say a fellow wanted to commit himself [227] for $5,000 he was putting in 500. That was the way it operated, 10% of the deal. And I says I wouldn't want to put more in myself, so at that time he knew that there were 8 other fellows besides Ernie.

Q. What is your occupation, Mr. Haas?

A. I build homes, houses.

Q. Do you do that in Fresno? A. Yes.

Q. Do you know anything about wells yourself?

A. No.

Q. Handing you Plaintiff's Exhibit No. 8, Mr. Haas, is that your signature on it?

A. That is, yes.

Q. Did you believe Mr. Shepard was telling you the truth when he made these statements?

A. Well, yes.

Q. And was the condition of the well on that land an important factor to you in deciding whether to purchase it, or not?

A. Well, yes. If there was no water there, the land was no good.

Q. If you had known that the well was actually in bad condition, would you have purchased the land at that price? A. No.

Q. Did you rely on what Mr. Shepard told [228] you? A. I sure did.

Mr. Rehnquist: We have no further questions.

(Testimony of Henry Haas.)

Cross-Examination

By Mr. Burch:

Q. You didn't know whether you were going to form a corporation or not in California, did you, Mr. Haas? A. Yes, I did.

Q. Isn't it a fact you were going to go back and talk to your lawyer over there, and decide what you should form?

A. No. Can I answer that question more fully?

The Court: All right.

The Witness: Well, when Ernie first come over with a proposition of buying the place, why, I contacted these fellows, and then my other brother-in-law called the attorney, and asked him whether that thing would work all right that way.

So we come over and picked up the Option, and then we went back and had a meeting right in the attorney's office, all nine of us.

Q. (By Mr. Burch): In November?

A. Yes.

Q. You didn't form the corporation until the following January, did you?

A. No, that isn't quite true. Can I qualify that?

The Court: All right, go ahead. [229]

The Witness: December the 13th, 1954, our name was approved, Cal-Nine Farms, by the State of California, and December the 23rd we got the Articles of Incorporation and, let's see, it was January the 7th, I believe, of 1955 we got the Seal, I believe you call it.

(Testimony of Henry Haas.)

So we were still in California at that time, and then when we had that, we come over here.

Q. (By Mr. Burch): When you came over with Mr. Otto, you already had your friends committed for the sum of $80,000.00, hadn't you, you and Mr. Otto, and the other men altogether were committed to $80,000.00, isn't that right, for the purchase of the land? A. I believe so.

Q. You didn't have any other land in mind but Mr. Shepard's, did you?

A. At what point are you referring to?

Q. When you and Mr. Otto came over in November? A. You mean the very first time?

Q. On the 17th of November, when you entered into the option agreement?

A. Did I have any other land in mind, you mean?

Q. You, or these eight men you testified went in with you to purchase this property?

A. We just had in mind whatever Ernie had in mind, that is all I know. [230]

Q. And Ernie had told you he had a piece of property he wanted to buy for $80,000.00, isn't that right? A. That is right.

Q. And you had all agreed to go with him and buy it? A. Yes.

Q. And you had already put up your earnest money, so to speak? You had that in your pocket, $2,000.00? A. That is right.

Q. You had already agreed at that time to purchase the land, hadn't you, among yourselves?

(Testimony of Henry Haas.)

A. Yes, if Ernie thought it could be bought, and that it was a buy.

Q. That is right.

A. None of the other fellows are farmers.

Q. They all relied on Ernie, didn't they?

A. That is right.

Q. And you did, too? A. That is right.

Q. You weren't relying on Mr. Shepard, were you?

A. When he talked to me and told me the well was in good shape, I certainly did.

Q. Of your own personal knowledge, you don't know whether the well was in good or bad shape, do you? A. No, I wouldn't.

Q. All you know is what Mr. Otto told you, is that correct? [231] A. That is right.

Q. And you had had Mr. Otto make an extensive investigation out there in regard to the well and land, didn't you?

A. I don't know whether you would call it real extensive. The way he told me, you don't exactly go around and pull the people's pumps out of the well and inspect the insides of them. That costs a lot of money, I understand.

Q. Mr. Otto had told you that? A. Yes.

Q. You had discussed the well, and he, at your direction, asked many people in the community out there what the situation was, hadn't he?

A. I believe he was relying on this Gordon Cameron's word quite a bit, his knowledge of the well.

Q. He had made some thorough discussion—he

(Testimony of Henry Haas.)

had had a thorough discussion with Mr. Cameron, is that correct?

A. That is what he said. That is all I know.

Q. At the time you talked to Mr. Shepard, this had all been done, hadn't it, the discussion with Mr. Cameron and the other investigation he made?

A. I believe so.

Q. And he had been on the property a number of times, hadn't he? A. That I don't know.

Q. Hadn't he told you that? [232]

A. He said he looked at the ranch. How many times he was there, I wouldn't know.

Q. The only thing that remained to do was to try to close the deal with Mr. Shepard, isn't that true?

A. On my part. That was my part, yes, as far as I know.

Q. When you had that meeting at the motel in Buckeye with a Mr. Otto, as already testified, there was some disagreement as to the terms, wasn't there?

A. Well, I don't know what you exactly mean by that.

Q. Do you recall him saying that he didn't have enough cotton allotment to purchase the property, to pay for it?

A. The cotton allotment was discussed. I don't know too much about cotton allotment, but he said he needed about so much allotment in order to make a go of the ranch, yes.

Q. He also at that time promised to put a house

(Testimony of Henry Haas.)

and a half a mile of cement ditch on that property if Mr. Shepard would reduce the amounts of the payments, didn't he? A. No, that isn't so.

Q. You never heard that? A. No.

Q. You heard all the discussion that was there?

A. I believe I heard most of it, yes.

Q. Did you ever leave the room while they were talking? A. No.

Q. Mr. Shepard was there, this man Woody, yourself, and [233] Mr. Otto, is that correct?

A. Yes. And Ed Diebert.

Q. He was in the shower, wasn't he?

A. Well, he wouldn't stay in the shower a couple of hours.

Q. He was in there part of the time, wasn't he?

A. Well, he might have been. It wouldn't have been no more than five minutes.

Q. Did he stay in the room the rest of the time, or did he leave?

A. No; he and Woody were more or less sitting on one bed, and Elmer was on the other one, and Ernie and I were sitting on chairs.

Q. Did you know this man Woody?

A. I knew him by sight, that is all.

Q. I think you said before you saw Mr. Shepard that day in November, you had stopped and seen Woody, is that right?

A. Like I say, I just had a casual conversation with him.

Q. Did you talk to him about the Shepard property?

(Testimony of Henry Haas.)

A. Yes. As we drove up, I says, "This place here"—the one they were picking on, which I believe was this fellow Gordon's, "sure looked a lot better than Elmer's place did." I mean, as far as I could see.

Q. Did he tell you anything about the Shepard property, in that respect? [234]

A. He said it just wasn't run right.

Q. Did you ask him about the water supply?

A. I did not ask him about the water supply, no.

Q. Do you know whether Mr. Otto talked to him about the water supply?

A. He may have. I don't know.

Q. Did Mr. Otto ever advise you he had talked to Woody about the water supply?

A. He told me he had talked to people around the neighborhood about the condition of the place.

Q. What did he tell you he had discovered about the water supply?

A. He told me it sounded all right to him, but it seemed like he just couldn't get to the bottom of it.

Q. Did he suspect there was something the matter with the water supply?

A. Well, not exactly, but nobody would exactly commit himself. I don't know.

Q. Who did he say wouldn't commit himself? Did Mr. Shepard ever not commit himself in anything? A. No.

Q. Mr. Shepard, did he tell you you couldn't investigate his property in any way?

(Testimony of Henry Haas.)

A. No; he just said the well was in good shape. That's all there was to it. [235]

Q. Did you ever ask for any information from Mr. Shepard that he failed to give you?

A. No; I didn't ask for any information outside of his word.

Q. And Mr. Otto told you he talked with the pump men about it, didn't he?

A. I don't know whether he did or not.

Q. You don't recall Mr. Otto ever telling you he had talked to the well men that drilled the well?

A. Yes. That would be Gordon Cameron.

Q. He did talk to him about it?

A. Oh, yes.

Q. You have heard Mr. Otto testify here in court that he thought the well was throwing about 2,000 gallons per minute at the time you and he looked at it that day?

A. I believe that is right.

Q. Did he ever tell you he thought it was throwing 2,000?

A. I can't remember, unless it was said there at the well head. He never told me anything about it later.

Q. He never told you that in his opinion the well was producing less than what Mr. Shepard had stated?

A. No; he took Shepard's word for it.

Q. I think Mr. Otto testified yesterday that the purported assignment made by you and he to Cal-

(Testimony of Henry Haas.)

Nine Farms was executed yesterday at noon, is that correct? [236]

A. That is right. But I have signed a lot of papers in Fresno, but I am not of a legal mind. That is all in our attorneys' hands. He and our secretary over there have the papers. Like I say, I have signed a lot of papers. I don't know what they are.

In fact, we have signed one paper to give Ernie the full operation over here.

In other words, he can do what he wants to. He can make an agreement with the gin, or with the bank, or whoever he wants to, because he is the largest stockholder.

Q. Did you bring your corporate minutes, as directed?

A. I called for them. They haven't arrived yet.

Q. Do you recall the corporation ever meeting at any time and authorizing this lawsuit?

A. Oh, yes.

Q. When did they do that?

A. I wouldn't know the exact date.

Q. Can you tell me approximately when that occurred?

A. I wouldn't know that. That is written down someplace. I don't know.

Q. You are perfectly willing to produce those minutes as soon as they arrive?

A. As soon as they come; yes.

Mr. Burch: No further questions.

The Witness: Could I qualify that thing? [237]

The Court: No. There is no question.

Mr. Rehnquist: We have no further questions.

(Witness excused.)

Mr. Rehnquist: Your Honor, we have some witnesses subpoenaed for 2:00 o'clock. We don't have any more here now.

The Court: How much longer will you take?

Mr. Rehnquist: Our remaining witnesses will not take more than 45 minutes.

The Court: We will recess until 2:00 o'clock.

(The noon recess was taken.) [238]

Friday, May 18, 1956—2:00 P.M.

(Court convened pursuant to recess.)

(Present: Same as before.)

The Court: You may continue.

Mr. Rehnquist: Might we have the Court's indulgence for one minute. We are discussing the possibility of stipulating as to some of the exhibits.

The Court: All right.

Mr. Rehnquist: Your Honor, by stipulation of counsel, may this be identified as the appropriate Plaintiff's exhibit and admitted in evidence, as the government loan figures on cotton for last year?

The Court: All right.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Said schedule of prices was received in evidence and marked as Plaintiff's Exhibit 16.)

Mr. Rehnquist: We will call Mr. Walmsley.

SIMCOE WALMSOLEY

called as a witness in behalf of the Plaintiffs having been first duly sworn, testified as follows: [239]

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?
A. Simcoe Walmsoley.
Q. Where do you reside, Mr. Walmsoley?
A. Buckeye.
Q. How long have you lived there?
A. About 10 years.
Q. What is your occupation?
A. Gin manager.
Q. For what company?
A. Western Cotton Products Company.
Q. Do you have several gins out in the Buckeye area? A. Yes.
Q. And are you in charge of all of them?
A. Yes.
Q. And do you, in the course of your ginning operations, keep records of the cotton crops sent to you for ginning of the various farmers out there?
A. Yes.
Q. And those records are kept under your supervision? A. Yes.
Q. And in the regular course of your business?
A. Yes.
Q. Have you at my request compiled from those records charts showing the cotton production of Mr. Cameron and Mr. Otto? [240] A. Yes.

(Testimony of Simcoe Walmsoley.)

Q. Do you have those with you? A. Yes.

Mr. Rehnquist: May these be marked for identification?

The Clerk: Plaintiff's Exhibit 17 for identification.

(Said documents were marked as Plaintiff's Exhibit 17 for identification.)

Q. (By Mr. Rehnquist): You, personally, made these from the records in your office, is that correct?

A. That is right.

Mr. Rehnquist: We will offer it in evidence.

Mr. Burch: If your Honor please, we have no objection to Mr. Otto's going in. As to Mr. Cameron's, I can't see that it serves any purpose particularly in the measure of damages unless all the records of the adjacent farms—we object without all the records be submitted to the Court.

Mr. Rehnquist: We believe that is a question of argument to the Court. We have the neighboring farm here and the man right next door and we feel that is a fair comparison.

Mr. Burch: In our examination of Mr. Cameron, he did point out it was not the same crop as Mr Otto had, that he had been on the farm an additional year, and there was a difference in yield each year from the year before. I don't see how it has any probative value. [241]

The Court: It may be received to save time, but I probably will not pay any attention to it, just as so many things go in, the Court doesn't pay any attention to them, but it saves argument.

(Testimony of Simcoe Walmsoley.)

The Clerk: Plaintiff's Exhibit 17 in evidence.

(Said documents were received in evidence and marked as Plaintiff's Exhibit 17.)

Q. (By Mr. Rehnquist): Mr. Walmsoley, does the price paid for cotton depend in part on the staple length of the cotton? A. That is right.

Q. And is the Government Loan Chart a minimum price which cotton farmers received for the cotton that they plant? A. That is right.

Q. They could receive more than that?

A. That is right.

Mr. Rehnquist: We have no further questions.

Cross-Examination

By Mr. Burch:

Q. Are you familiar with the farms out in the Harqua Hala Valley, Mr. Walmsoley?

A. Yes.

Q. There are six or seven farms out there?

A. That is right.

Q. Do you recall the production of the Hollenstein farm [242] for last year?

A. Not exactly; no.

Q. Can you make an estimate?

A. About a bale and a half.

Q. The Massingale Farm?

A. A little less than two bales.

Q. How does that compare with the Cameron farm?

A. Cameron, I believe, made a little better than

(Testimony of Simcoe Walmsoley.)

two. I don't know exactly for sure. Right around two bales, maybe a little more, maybe a little less.

Q. There was considerable difference in yield, then, in different farms out there last year, is that true? A. Yes.

Q. Do you know what that could be attributed to? A. No.

Q. Was there some rain damage out there?

A. Rain?

Q. Yes. A. Well, not bad. A few ditches.

Q. Was there much damage of any sort?

A. A few ditches were broken, not bad, just minor damage, I would say.

Q. Did you observe it yourself? A. Yes.

Q. The area was isolated out there as a result of the [243] floods, isn't that right?

A. That is right.

Mr. Burch: That is all.

Redirect Examination

By Mr. Rehnquist:

Q. Did you have occasion to go out and visit these different farms? A. Yes.

Q. And did you visit the farm being operated by Mr. Otto last year? A. Yes.

Q. Did you have occasion to look at his cotton crop around June 1st? A. June, yes.

Q. Did it appear to be good around that time?

A. Good, yes.

Q. Did it appear to be good July 1st?

(Testimony of Simcoe Walmsoley.)

A. Yes.

Q. August 1st? A. Yes.

Q. How about September 1st?

A. I thought it looked pretty good. It was a good stand, and all that, but it was suffering for water.

Mr. Rehnquist: No further questions. [244]

Recross-Examination

By Mr. Burch:

Q. Did you observe the well or pump in operation out there?

A. I did the first of September.

Q. Did you observe it at any time prior to that?

A. Yes.

Q. Did it seem to be producing enough water for his crop at that time?

A. It was a pretty good well.

Mr. Burch: No further questions.

Mr. Rehnquist: May this witness be excused?

(Witness excused.)

Mr. Ragan: The next witness is Mr. Carter.

JAMES R. CARTER

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Ragan:

Q. Will you state your name, please?

A. James R. Carter.

Q. Are you here pursuant to subpoena, Mr. Carter? A. Yes, sir.

Q. Where do you live?

A. 1937 West Weldon in Phoenix.

Q. How long have you lived in Phoenix? [245]

A. I was born and raised here, sir.

Q. What is your occupation?

A. I work for the University of Arizona as an Assistant County Agricultural Agent.

Q. How long have you worked in that capacity?

A. Since 1948.

Q. What is your educational background, Mr. Carter?

A. I am a graduate of the College of Agriculture of the University of California at Davis.

Q. The Davis College? A. Yes, sir.

Q. And you graduated when?

A. In 1948, sir.

Q. And did you take employment right after that? A. Yes, sir.

Q. And that was where?

A. At Yuma, sir, first.

Q. For how long?

A. I stayed there for the summer of 1948, and

(Testimony of James R. Carter.)

then transferred to Washington State at Yakima. I worked at Washington State College.

Q. For how long? A. For two years.

Q. And then where?

A. I came back here to Phoenix. [246]

Q. At that time you were employed as an assistant? A. Assistant Agent, yes, sir.

Q. Assistant Agent. And since 1950, then, is that correct? A. Yes.

Q. Now, in your job, what does it have to do with cotton, if anything?

A. My program revolves around field crops, and cotton is one of the primary ones.

Q. Cotton is one of the primary ones. What does your job consist of itself, Mr. Carter?

A. I guess it would best be described as a consultant type thing, where information that is obtained from various experiment stations is taken by me or others like me to growers in the area.

Q. Does that have to do with all things in connection with the cotton crop, such as irrigation, and cultivation, and everything else?

A. Yes; all cultural operations.

Q. Are you familiar with cotton growing conditions in the Harqua Hala Valley?

A. Yes, sir.

Q. Assume a crop of cotton in that valley having been planted around early May, 1955, and if that crop were water stressed around the first of September, would continued [247] irrigation cause

(Testimony of James R. Carter.)

shock to such cotton plants, which would knock off some bolls as well as squares?

A. May I ask you to rephrase that, or ask it again?

Q. Surely. Assume a crop of cotton planted in the Harqua Hala Valley in May of 1955. If this crop progressed, and around the first of September, 1955, it was in a water stressed condition, would irrigation given to that crop at that time cause a shock, such as would cause the small bolls, flowers and squares to fall from cotton plants?

A. Yes, sir.

Mr. Burch: If the Court please, I object to that. No foundation laid for this man to answer. The question itself is vague and ambiguous. He says, "water stressed." He doesn't say how, for how long. It assumes many things not in evidence. No relationship to this trial. I don't see any probative value.

The Court: He may answer.

The Witness: There is a possibility that it could knock those types of plant parts off

Q. (By Mr. Ragan): Are you familiar with the method of determining the gallon-per-minute discharge used to irrigate cotton? A. Yes, sir.

Q. Is that method in terms of a mathematical formula? [248]

A. The basic background is in a mathematical type formula.

Q. What is that type formula?

A. That is where flow is generally said to equal

(Testimony of James R. Carter.)

the area that material is flowing to, times the velocity that it passes a particular point.

Q. In the determination of the area, what do you need to know?

A. The dimensions of the tube or flume, or whatever it is that it is flowing through, sir.

Q. Is there a formula for area itself?

A. Yes, sir.

Q. Is that pi times radius square?

A. For a circle, yes, sir.

Q. For a siphon tube that you are familiar with in your experience, they are circles on the discharge end, are they not? A. Yes, sir.

Q. And then to determine velocity, what do you need to know?

A. Your velocity is determined by the amount of drop that the material goes through, or the head times gravity.

Q. When you say the head, is that the inch drop from the water level in an irrigation ditch to the top of the discharge end of the tube? [249]

A. That is approximately correct, yes, sir.

Q. Are there any other elements that require to be known before this formula can actually be applied?

A. Yes, sir. Materials, each different kind of materials have what they call a friction factor, if you want to call it that, and also if the material flows through a straight type tube, or flume, or whether it has bends or crooks in it, and also the amount or the distance that it travels.

(Testimony of James R. Carter.)

Q. The length of the tube?

A. If it is the length of the tube.

Q. Assume a 7½-foot aluminum material irrigation siphon tube with three bends. What is the applicable coefficient of friction to this formula, if you know?

A. I can't say exactly what it would be, because it would have to be determined by actual trial.

Q. In your experience, do you have an opinion as to what the approximate coefficient of friction is?

Mr. Burch: If the Court please, the man has already said he would have to know——

The Court: No; the answer wouldn't help me a particle. You are wasting my time.

Q. (By Mr. Ragan): Has this formula of which you speak been tested scientifically, to your knowledge? A. Yes, sir. [250]

Q. And where, if you know?

A. Two places that I know of, sir, would be the University of California. And there is an experiment station in Nebraska.

The Court: What do you want to prove by this witness?

Mr. Ragan: I want to prove by this witness, your Honor, that there is a method of determining the gallon per minute discharge of a tube mathematically, if you know the head, the level of the tube, and that you can, therefore, multiply the number of tubes you are using at that constant head, and determine the output of the well.

(Testimony of James R. Carter.)

Mr. Burch: I couldn't quite hear your statement. Was that last part in regard to output of the well?

The Court: Yes.

Mr. Ragan: I have a chart which this witness, through experience, knows to be accurate, which I wish to submit in evidence.

Mr. Burch: May I ask a question on voir dire, your Honor?

The Court: All right.

Q. (By Mr. Burch): Mr. Carter, even though you may know what is coming out the end of those tubes, out of the end of those discharge pipes, unless you know ditch seepage, evaporation, and a number of other things, you wouldn't know the output of that well, is that right? [251]

A. No. That is right.

Mr. Burch: That is all.

Mr. Ragan: May I proceed with this exhibit?

The Court: All right.

Q. (By Mr. Ragan): I now show you Plaintiff's Exhibit 18, which is a chart showing water discharge and gallons per minute, based on an aluminum tube, and carries the different tube lengths, and the diameters of the tubes, and the head factor.

Now, in your experience, have you had occasion to test this chart against aluminum tubes to know whether or not it is in your opinion accurate?

A. Yes, sir; these charts were made up from curves that are actual tubes that are run I believe

(Testimony of James R. Carter.)

this particular one is made up by the University of California, College of Agriculture.

Mr. Burch: If the Court please, the answer is not responsive. He asked him if he had checked by experiment himself the results contained in that chart.

Mr. Ragan: I believe he said yes, sir, when I started out.

Q. (By Mr. Burch): Have you run those experiments yourself?

A. No; I haven't run the experiment to see if any particular tube has a particular capacity, but I have seen them checked against known capacities, so I feel this is approximately [252] correct.

Mr. Burch: I will again object. No foundation for this particular witness has been laid.

The Court: Go ahead.

Mr. Ragan: Do you want to see this?

Mr. Burch: No.

Mr. Ragan: May it be admitted in evidence?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 18 in evidence.

(Said chart was received in evidence and marked as Plaintiff's Exhibit 18.)

Q. (By Mr. Ragan): One more question, and that is this, if you are able, through this chart, to determine the flow capacity of one tube, then you were given the fact that 55 tubes of the same kind, the same diameter, the same length, and the same head are taking the full discharge of the well, is it

(Testimony of James R. Carter.)

then possible to multiply 55 times the chart showing for the one tube to determine the capacity of the well?

The Court: I don't see why that couldn't be done by anybody.

Mr. Ragan: Would you just answer that?

The Witness: Yes, sir; with this one exception of evaporation and seepage loss. [253]

Mr. Ragan: That is all; thank you.

Mr. Burch: That is all.

Mr. Ragan: Just a minute.

Q. (By Mr. Ragan): Mr. Carter, your experience as a cotton consultant to farmers in your job, do you have an opinion as to whether or not the lack of water hurts a cotton crop?

The Court: Oh, I will take judicial notice of that.

Mr. Ragan: Thank you, your Honor. May the witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Rehnquist: I call Mr. Verne Tower.

VERNE A. TOWER

called as a witness for the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Will you state your name, please?

A. My name is wrong on the sheet. It is Verne, V-e-r-n-e A. for Adam. You have it Vernon on the sheet. Verne A. Tower.

Q. My apologies, Mr. Tower. Where do you live? A. 516 West Vernon Avenue.

Q. What is your present occupation, Mr. Tower?

A. Retired. [254]

Q. What was your occupation in 1953 and 1954?

A. Pump and engine business.

Q. By whom were you employed?

A. State Tractor and Equipment Company.

Q. What was your job?

A. What we term it, sales engineer.

Q. And what were your duties?

A. To sell pumps, locate prospects, and sell our equipment.

Q. And did you have occasion to visit various ranches out in the Buckeye area in the course of that job?

A. Yes. All of them were our customers.

Q. Was Mr. Elmer Shepard a customer of yours in 1953? A. Yes.

Q. And was he in 1954? A. Yes.

Q. Calling your attention to the summer of 1953,

(Testimony of Verne A. Tower.)

Mr. Tower, did you have occasion to pull a pump for Mr. Shepard then?

A. Yes; we pulled a pump, I believe it was—I'm not too familiar remembering dates, but I would say it was during August.

Q. This is the summer of 1953 that would have been about three or four months after the well was drilled? A. Yes; we did. [255]

Q. And do you remember the reason for pulling the pump at that time?

A. The bowls were worn badly.

Q. And did Mr. Shepard make any statement to you to that effect before it was pulled?

A. No.

Q. Do you remember if the output of the well had gone down?

A. Yes; it had dropped off some.

Q. And what did you do at that time, Mr. Tower, to the bowls?

A. Replaced them with a different design bowl with different material in the bowls.

Q. What was the purpose for those newly designed bowls?

A. Trying to overcome the wear from the abrasive material that the well was producing.

Q. That would be sand?

A. Sand, silt and sand.

Q. Did you have occasion to pull that pump again the next summer, in 1954, Mr. Tower?

A. Yes; I believe it was 1954, some time in the middle of the summer.

(Testimony of Verne A. Tower.)

Q. And do you remember the reason for pulling it at that time?

A. The bowls were worn again. [256]

Q. And the output of the well declined?

A. It had dropped off. That is the reason we were trying to bring it back into capacity.

Q. Substantially? A. Quite a lot; yes.

Q. And what did you do at that time?

A. The bowls were remachined, and brought back to as near new condition as possible.

Q. Was that in accordance with your advice?

A. That was the only thing we could do.

Q. Did you suggest new bowls should be put on?

A. Yes; it was suggested new bowls.

Q. And Mr. Shepard did not do that?

A. Well, there was two factors there. One, the bowls, that would take about three weeks to get them, the new bowls, and right in the middle of his cotton crop, why, he couldn't wait three weeks for water, and the machining of the bowls, building the impellers up, and putting new rings in the bowls could get by until such a time that we could get the new bowls.

Q. Or Mr. Shepard could sell the property?

Mr. Burch: If the Court please, I don't think we need that kind of remark for your benefit.

The Court: I don't think so, either.

Mr. Rehnquist: My apologies to the Court. [257]

Q. (By Mr. Rehnquist): Mr. Tower, was that as satisfactory a remedy to the bowl condition as the replacement of the bowls would have been?

(Testimony of Verne A. Tower.)

A. No. I would say that you could never in remachining bowls build back the efficiency that the new bowls would have.

Mr. Rehnquist: No further questions.

Cross-Examination

By Mr. Burch:

Q. Mr. Tower, you state the well was, the bowls were pulled early in 1953 some time. Were you there prior to the time the bowls were pulled?

A. Oh, I was there on an average, I would say, twice a month to all of those wells in the project. Sometimes oftener.

Q. I understand when bowls are pulled from the pump, it is a matter of routine to repair them at that time, regardless of condition?

A. That is right.

Q. The farmers always send them in and anything that is necessary is done, is that right?

A. Yes; that is the usual practice.

Q. If a farmer isn't around, and the pump men pull a bowl, they will take it in as a matter of course? A. No. That hasn't been our policy.

Q. It is a general policy for a farmer to have his bowls worked over?

A. With a farmer's permission and consent, the work is done. [258]

Q. This first set of bowls put in were a different design from the old one, is that correct?

A. That is right.

Q. Gordon Cameron had the same thing done,

(Testimony of Verne A. Tower.)

I believe, is that right? A. That is right.

Q. His type of design was just the opposite from Mr. Shepard's?

A. No; the replacement bowls were identical, both of them.

Q. That was sort of a sealed unit?

A. They were cast iron impellers with heavy porcelainizing.

Q. And what was the original type of bowls?

A. A semi-open impeller, with full bronze impellers.

Q. You are not a pump repairman, I take it?

A. No.

Q. You didn't do the work on these, I take it?

A. No.

Q. That was someone in your shop?

A. That is right.

Q. Did you go in and assist with that work at all? A. No.

Q. Did you ever see the work done?

A. Yes. [259]

Q. What was your occasion to go in and see it being done?

A. Just to see how they were getting along, how fast they could get that going again.

Q. Did you examine the new bowls put down in the shaft?

A. The new bowls were—yes, I looked the new bowls over.

Q. Did that mean a matter of breaking them down?

(Testimony of Verne A. Tower.)

A. No. From the suction end of the bowl assembly is visible the first impeller, and the second impeller.

Q. This first bowl, I take it, wore out during that summer of 1953, is that right? A. Yes.

Q. And they were not apparently the type that was necessary to do the job out there?

A. They were the type we had been using right along, and used a number of sets of them in that valley.

Q. Had you used that same thing with Gordon Cameron? A. Yes.

Q. Had he had the same experience with it?

A. He had the same experience with it.

Q. So you shifted the type of bowl you had been using?

A. Yes; trying for better material that would withstand the abrasive condition of the pumping.

Q. Then it was approximately another year before those bowls were repaired, is that right?

A. You are talking now about 1954? [260]

Q. 1954. A. Yes.

Q. Were you out there at the time they were pulled? A. No.

Q. Then your understanding as to the reason for them being pulled—who told you the reason for its being pulled?

A. They brought the bowls into the yard.

Q. That would have been a matter of routine, anyway?

A. That would have been a matter of routine. I

(Testimony of Verne A. Tower.)

think Mr. Shepard requested they take them in and repair them.

Q. Isn't it true there had been some trouble with the operation of the engine and portions of the shaft on that particular well?

A. That I couldn't tell you, sir.

Q. You don't know? A. I don't know.

Q. You don't know whether or not that was true, that the bowls were pulled in the first place?

A. No; I couldn't tell you.

Q. Then this was just a guess on your part as to the reason?

A. I am talking about the operation during the month of August.

Q. Your statement was based on what was discovered afterwards in the shop, is that right? [261]

A. During the month of August, during the earlier period when they pulled the pump, I was busy on one of the Air Force jobs, and was not on that particular job at all.

Q. That was when?

A. That was early in spring, I would say.

Q. You did know they had some difficulty with the operation?

A. I heard about it, and when I had an opportunity, I went out to see it. What I am speaking of is that that was done during the month of August.

Q. As a matter of fact, it was not done during the month of August, but the last week or so of July, isn't that correct?

A. All right, in August, I would say.

(Testimony of Verne A. Tower.)

Q. You weren't out there at the time that was pulled, I think you stated?

A. No; I wasn't there at the time they pulled the pump.

Q. How long had it been since you had been out there?

A. Oh, it had been a matter of two weeks, probably three.

Q. So you don't know what the situation was immediately prior to the time they were pulled?

A. No; I don't.

Q. Did you observe the well after the pump had been pulled and new bowls put in? A. Yes.

Q. Not new bowls, but a repair job? [262]

A. Yes. That brought the capacity up again.

Q. It did bring the capacity up? A. Yes.

Q. Repair of the bowls is a customary job in your occupation? A. It is customary.

Q. It is done every day, isn't it, down there?

A. Not every day, but we like to sell new bowls.

Q. You have a number of men down there employed in the repair of those bowls, haven't you?

A. Right.

Q. And as near as you know, the job was well done?

A. The job was well done and very satisfactory.

Q. That was pretty near at the tail end of the irrigating season. You had August and a lot of September left?

A. He had August and all of September.

(Testimony of Verne A. Tower.)

Q. If he started picking in September, he probably wouldn't be irrigating as much?

A. That is right.

Q. Do you know, as a matter of fact, he did start picking? A. No.

Q. You weren't out there?

A. I wasn't out there when he started picking.

Q. You were there about every two weeks?

A. It varied, until crops were laid by, and [263] equipment more or less laid off, then we turned our efforts to something else.

Q. At the end of the 1954 season, the well was producing as well as it always had?

A. It wasn't producing as well as it did originally.

Q. When was that?

A. That was in 1953 when we started out.

Q. At the end of 1954 it was not doing that good, then? A. That is right.

Q. When did you make that observation?

A. After we installed the repaired bowls in the pump and reassembled the pump and put it to work.

Q. I thought it was your statement it did as well as ever.

A. No; my statement was you never can build back the efficiency in machining bowls as in new bowls.

Q. Did it produce a good head of water?

A. It was a fair head. I don't know the capacity. No attempt to say exactly. We say it was

(Testimony of Verne A. Tower.)

a half pipe, full pipe, three-quarter pipe. That's it.

Q. Did you ever make an estimate that it produced approximately 2,600?

A. I think at one time that well could have been between 25 and 2,600, just a rough guess.

Q. You had a conversation to that effect, didn't you, since the time Mr. Otto purchased the [264] property? A. No.

Q. Do you recall meeting Mr. Shepard and Mr. Cameron on the road one day out there and Mr. Shepard asked you as to the production of it, and you stated you thought it might not do 28, but it would do 2,600?

A. Which well are you talking about?

Q. Mr. Shepard's well, the one Mr. Otto was using. A. No; that well never did do 2,800.

Q. You said you did estimate it might have done 2,600? A. 25 to 2,600.

Mr. Burch: That is all.

Redirect Examination

By Mr. Rehnquist:

Q. At what time did you estimate it might have done 25, 2,600?

A. That was last fall, I believe, at one time.

Q. Which fall?

A. This past fall of 1955.

Mr. Rehnquist: No further questions.

(Testimony of Verne A. Tower.)

Recross-Examination

By Mr. Burch:

Q. That was when Mr. Otto was farming it?

A. Otto was farming it at that time.

Q. It had about 2,600 capacity at that time?

A. No; it didn't have 2,600 gallons capacity at any time [265] that Mr. Otto had it, and the latter part of Mr. Shepard's operation there the well was dropping off.

Q. I misunderstood your statement. I thought your statement was you estimated during last fall it might have got up to 2,600.

A. Originally when the plant was new.

Q. You don't know what it will do now?

A. No; I haven't any idea. In fact, I haven't been out in the area since the first of February.

Q. Of when? A. February of this year.

Q. You said you were unable to make an estimate of what it was doing in gallons after the last time the bowls were pulled for Mr. Shepard, is that correct?

A. That is right. He was getting sufficient water for the crop, and he was very happy, and we were very happy he was happy.

Mr. Burch: That is all.

Mr. Rehnquist: That is all.

(Witness excused.)

Mr. Rehnquist: Mr. Roberts.

C. K. ROBERTS

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows: [266]

Direct Examination

By Mr. Rehnquist:

Q. Will you state your full name, please?

A. C. K. Roberts.

Q. Where do you live? A. Buckeye.

Q. How long have you lived there?

A. Since 1948.

Q. What is your business? A. Real estate.

Q. You conduct that business out at Buckeye?

A. Yes, sir.

Q. How long have you been in the real estate business? A. Since 1948.

Q. Have you been self-employed all that time?

A. No. For about four years I was with another broker. Since that time I have been self-employed.

Q. You have been self-employed since about 1952? A. Yes.

Q. Did you ever have occasion to visit the property owned by Elmer Shepard out in the Harqua Hala Valley during 1954? A. Yes.

Q. Do you remember about what time that was?

A. Well, it was about, after the planting season of cotton. I don't have the exact date. Probably May or June. [267]

Q. Did you have occasion to observe Mr. Shepard's well and pump at that time?

A. Yes; I saw it.

(Testimony of C. K. Roberts.)

Q. Do you know whether or not there was a bonnet on the spout at that time? A. A what?

Q. An elbow turned down on the spout at that time? A. No.

Q. Would you clarify that answer a little?

A. I do not recall of anything on the end of the spout. The water came out straight.

Q. It was just a straight spout?

A. As I recall.

Q. Did you have occasion to converse with Mr. Shepard during the summer of 1954 about selling the property?

A. Yes. He had offered his property for sale.

Q. Did he tell you at what price he would sell it?

A. Well, I didn't have a written listing, but, as I recall, it was $80,000.

Q. And did Mr. Shepard later have a further conversation with you about that property?

A. Yes.

Q. And what was that conversation?

Mr. Burch: Let us have time and place, if your Honor please. [268]

Q. (By Mr. Rehnquist): All right, do you remember when it was? What time of year was this, this later conversation?

A. The later conversation?

Q. Yes.

A. It was during cotton growing season, probably July.

Q. And what was this conversation?

(Testimony of C. K. Roberts.)

Mr. Burch: Again we would like to know who was present, and where it took place.

Q. (By Mr. Rehnquist): Was anyone else present? A. No.

Q. Do you remember where this conversation took place?

A. As I recall, the second conversation, or conversation regarding a lesser price was on the street n Buckeye.

Q. And what was that conversation?

A. Well, as I recall, he said that if I had an interested prospect he would take less money than the original previous price.

Q. Did he give you any idea how much less?

A. Well, there was no stated amount less. It was assumption, I suppose, in my opinion, that it would be considerable less.

Mr. Rehnquist: No further questions. [269]

Cross-Examination

By Mr. Burch:

Q. Did you go out to the Harqua Hala Valley the first time to solicit Mr. Shepard's property for sale?

A. Did I go out to solicit it for sale?

Q. Yes. A. No; I don't recall that I did.

Q. What was your business out there that day?

A. When you are in the real estate business, and especially in an area that is developing, you are apt to be in the area quite frequently without any one specific thing.

(Testimony of C. K. Roberts.)

Q. You were looking for prospects to put their land up for sale, isn't that right?

A. You always are. At least I always am.

Q. And you talked to Mr. Shepard in that respect?

A. You mean out in the Harqua Hala Valley?

Q. Yes.

A. Sure, I talked to him, but I am not stating that it was there that he specifically told me his land was for sale.

Q. He never gave you any listing on it, did he?

A. Well, you mean a written listing?

Q. That is right. A. No, sir.

Q. There never was anything between the two of you in the way of a contract in writing, was there? A. No more than verbal. [270]

Q. His statement to you was that he wanted $80,000 if the property was to be sold, is that right?

A. That is part of it, yes.

Q. You say you met him on the street. When was this? Several months later?

A. Several months later, yes.

Q. He didn't say he would take less, but indicated it, isn't that right, isn't that the idea?

A. He said he would take less, but, as I stated, he didn't state the amount less.

Q. How did you happen to run into him in Buckeye? Did you look him up? A. Oh, no.

Q. Just happened to be casually passing?

A. We met on the street.

Q. How long did that conversation take?

(Testimony of C. K. Roberts.)

A. It wouldn't take very long to make that much conversation. We Buckeye people are friendly enough that we might make quite a little conversation.

Q. Did you on that occasion?

A. Yes; we talked some little time.

Q. Did you ever talk to him on other times about his property? A. Oh, yes.

Q. When was that? [271]

A. I sure wouldn't have specific dates, but it was frequently, or occasionally.

Q. I think you said you talked to everybody in the Harqua Hala Valley, is that right?

A. No; I don't think I could say I talked to everybody in the Harqua Hala Valley.

Q. Did you talk to a number of people out there?

A. Yes; I have been in the real estate business and in desert land selling to the extent I realize you have to get around and see the land and see the people, and that I often do.

Q. So you went out, I take it, this first trip you ran into him, you were just out there scouting around, seeing what the situation was, is that right?

A. You mean regarding his land?

Q. Yes. A. No; I wouldn't say that.

Q. You said you didn't specifically go out to see him. You were going out to see as many people as you could, is that the idea?

A. No. Mr. Shepard's land is so located that you pass his land in getting to many pieces of property that I have for sale, and it is not unusual to simply

(Testimony of C. K. Roberts.)

be driving by and stop, and especially if he was around, and that I did on a few occasions. [272]

Q. This spout on the well, you have testified you cannot remember seeing a bonnet on it. Can you recall what the occasion was that you examined this particular discharge pipe?

A. Well, I didn't make any specific examination for any such thing. I just never saw it on there.

Q. Or never noticed it if it was on there, is that right?

A. That is right. I was at various wells, and that is one thing that anyone interested in agricultural operation of selling the land, or, I would say, even just plain curious, would appreciate seeing water flowing out in the desert.

Q. How big was the weir box next to that pump, do you know? A. No.

Q. Did the water discharge into the weir box?

A. Yes; as I recall, it did.

Q. The discharge pipe, as a matter of fact, passed over the weir box, didn't it?

A. No; I wouldn't recall that it did.

Q. You don't recall that it passed over one edge of the weir box?

A. Oh, yes; it may have passed into the—close enough to the weir box to run the water in naturally, or it would be very conspicuous. I probably would have noticed that.

Q. As a matter of fact, the weir box, the narrow edge faced the discharge pipe, didn't it? In other words, the weir [273] box ran lengthwise in this

(Testimony of C. K. Roberts.)

direction, if you can see my hand, pointing north and south, whereas the discharge pipe was facing east and west, so to speak? I am not sure the directions are right, but that was the situation? The length of the weir box was this way, and the discharge pipe was the short way?

A. The short way of the weir box. I sure don't recall that, no, sir.

Q. Is it possible that this discharge pipe had a bonnet welded on it so that it pointed the water down and you did not notice it?

A. Well, it is possible I just didn't happen, it just didn't happen when I happened to see it. It just wasn't there when I happened to see it.

Q. If it has been testified in this court that the bonnet was put on in February, 1954, could it have been possible that you looked at it prior to that time?

A. Well, it is possible, but it certainly was not on there when I looked at it.

Q. You testified that the discharge from the discharge pipe, the water flowing was not of force enough to go across the narrow strip of the weir box, is that right?

A. As I recall, there was no water being wasted. I would say that—I can't draw you a map of the weir box and just the size of it, or anything else like that—it was pumping water and it was going in the weir box, that is for sure. [274]

Q. Is it your testimony the water was going out straight like that and falling of its own gravity in

(Testimony of C. K. Roberts.)

the weir box, is that right? A. Yes.

Q. Do you have any idea how wide that strip was across the weir box?

A. No; I don't recall.

Q. Do you know whether there was a flange there at the time? A. No; I don't.

Q. Did you ever see the pump in operation in 1953? A. In 1953?

Q. Yes.

A. Yes; I presume I did in 1953 and 1954, I saw it pumping.

Q. Did you ever see it after this time in 1954 you speak of, in April or May, was it?

A. Yes; May or later.

Q. Did you ever go out there again?

A. Yes.

Q. Did you ever make any examination of the discharge pipe later on?

A. Well, no, I didn't. At one time when I was out there I was on the opposite end of the land where they were—I believe Mr. Shepard was there and irrigating at that time. But [275] I don't recall being at the well at that particular time.

Q. That was actually another different piece of property, wasn't it, altogether? A. Yes.

Q. Do you recall any time in 1953 you went and looked at the well?

A. Well, I was out there several times in 1953 and 1954.

Q. Specifically, if you can name the month, please.

(Testimony of C. K. Roberts.)

A. Well, I could sure hit a month by just saying the month. That was quite a long time to recall any specific date, and that would be very difficult. Nevertheless, I was out there several times during 1953, 1954, and 1955.

Q. Was there any other specific time that you can recall that you ever noticed the discharge pipe in this condition?

A. In that same condition, you mean, with a straight discharge pipe?

Q. Yes.

A. Oh, yes. When the pump was first pumped, I would say first pumped, it was in the early stages of development, I saw the pump working.

Q. That was in 1953?

A. Yes. It was a straight discharge, as far as I know.

Q. That is the memory you have of it now?

A. That is right.

Q. You don't know what its condition was in the fall of [276] 1954? You don't remember?

A. No; I don't. In other words, from the time I believe the pump was pulled, and so forth, and how it was put back in operation, I don't recall.

Mr. Burch: That is all.

Mr. Rehnquist: No questions. May this witness be excused?

The Court: He may be.

(Witness excused.)

Mr. Rehnquist: The plaintiff rests.

First, we want to get in one more purely documentary thing.

May this be marked?

The Clerk: Plaintiff's Exhibit 19 for identification.

(Said document marked for identification as Plaintiff's Exhibit 19.)

Mr. Rehnquist: We will offer in evidence the certified copy of qualification of the Arizona Corporation Commission with respect to Cal-Nine Farms.

The Court: It may be received.

(Said document received in evidence and marked as Plaintiff's Exhibit 19.)

The Court: With that you rest?

Mr. Rehnquist: Plaintiff rests.

The Court: We will have the afternoon recess.

(The afternoon recess was taken.) [277]

The Court: You may proceed.

Mr. Burch: If the Court please, since counsel for the plaintiffs has rested, I have a motion to present at this time.

The Court: All right.

Mr. Burch: If the Court please, the defendants move for judgment for the defendants on the grounds and for the reason that plaintiffs have failed to prove the material allegations necessary in Complaint of Fraud; in that, first, they failed to show that this plaintiff, Cal-Nine Farms, ever entered into any agreement with this defendant, and

is nothing more than a mere assignee of Mr. Otto's and Mr. Shepard's rights as of noon yesterday.

Secondly, that the plaintiff was not in existence at the time of the alleged fraud, and, therefore, cannot complain of such.

Third, that an assignee under the rule of the Supreme Court in the State of Arizona cannot bring a fraud action. There is no common law right where a corporation, for a corporation to bring a fraud. Actually, the only way they could bring one as assignee is by statute, and there is no Arizona statute that provides that such an action be maintained.

Fifth, they have failed to prove the elements of fraud as set forth in the Arizona cases, to wit, they have failed to show that there was any knowledge of any false statement, or any reckless disregard of the truth on behalf [278] of the defendant, Elmer Shepard. They failed to show that he induced the plaintiffs to buy, but, on the other hand, by their own testimony have indicated they induced him to sell, and there has been no proof of damage, in that the evidence failed to show the value, the true value of the property, if the representations made by Mr. Shepard as alleged were correct, and the actual value of the property as they received it, which was necessary before any damage can be awarded.

Upon those grounds, and for those reasons, your Honor, we move for judgment for the defendant.

The Court: Motion denied. Call your first witness.

Mr. Burch: I will call Mr. Thiebeau.

ROBERT T. THIEBEAU

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please?

A. Robert T. Thiebeau.

Q. Spell your last name.

A. T-h-i-e-b-e-a-u.

Q. Where do you live, Mr. Thiebeau?

A. In Buckeye, Arizona.

Q. How long have you lived out in the neighborhood? A. Approximately 5½ years. [279]

Q. What is your occupation?

A. Farm labor.

Q. Have you ever worked in the Harqua Hala Valley? A. Yes, sir, I have.

Q. Who have you worked for out there?

A. For the Mary E Farm, and also for Jimmie Walker Harrison.

Q. Are you acquainted with the land out there that was formerly the property of Mr. Elmer Shepard? A. Yes, sir; I am.

Q. Do you know Mr. Otto, who is seated here in court today? A. Yes, sir.

Q. Were you working in the Harqua Hala Valley last year? A. I was.

Q. Who were you employed by at that time?

A. Jimmie Harrison.

Q. Do you recall when the rains hit the Harqua

(Testimony of Robert T. Thiebeau.)

Hala Valley last year? A. I do.

Q. Do you recall approximately what time of the year that was?

A. That was in the last part of July and first part of August.

Q. How long did those rains continue out [280] there? A. Five weeks.

Q. What were the conditions generally of the country out there as a result of those rains?

A. Well, it was all flooded, as far as that goes, and Jimmie Harrison, he lost half a mile of cement ditch.

Q. What was the condition of the ground out there during that period of time?

A. Well, the condition was the ground was washed more than I had ever seen it washed.

Q. Were you able to travel out there?

A. Sometimes we were and sometimes we were not.

Q. How were you able to get around when you could travel?

A. With a four-wheel-drive Jeep.

Q. Were the roads passable?

A. No; they weren't.

Q. What did you have to do to travel out there?

A. We had to go around by Gordon Cameron's to get out through the desert.

Q. Gordon Cameron's property is immediately adjacent to the property Mr. Otto farms, is that right? A. That is right.

Q. Recalling to your mind about the first of

(Testimony of Robert T. Thiebeau.)

August at the end of those floods, did you have occasion at any time to participate in a conversation with Mr. Otto with regard to the damage done to crops out there? [281]

A. When we were coming back from Buckeye, I and Travis Shahan, and Mr. Brooks.

Q. Who is Brooks?

A. He is the fellow that worked out there with Mr. Harrison.

Q. And who was Travis Shahan?

A. He was the foreman for Jimmie.

Q. Go ahead.

A. And we come across Massingales. We was stuck in the truck, and we walked over toward Otto's ranch there, I and Travis and Mr. Brooks, and he came walking out, him and another man. I didn't know the other man.

Q. Mr. Otto?

A. Yes, sir. And he asked Travis what damage it had done to Jimmie, and he told him it washed out half a mile of cement ditch, and Travis asked him what damage did it do to you, and he said, "It ruined me."

Q. That was immediately after the rains, is that correct? A. That is right.

Q. What was your own observation of the country right there?

A. Well, I do know I had to refurrow it out. It was washed all clear through, and as far as I could see in any direction, there were approximately 5 to 6 inches of water running over the ground. In fact,

(Testimony of Robert T. Thiebeau.)

there at the trailer houses [282] where we were, there was 6 inches of water running through all of the airport, and all.

Q. Are you familiar with the general direction of drainage in that country? A. Yes, I am.

Q. Where does Mr. Otto's property lay in relationship to the natural drainage?

A. Well, from, I would say it lies from Gordon Cameron's farm, the drainage runs northeast.

Q. How would that affect Mr. Otto's property?

A. Well, the water from the mountains up there would be adrifting down right towards his direction of his farm.

Q. It was his statement on this day that you refer to that he had been ruined by the damage, is that correct? A. That is right.

Mr. Burch: You may cross-examine.

Mr. Rehnquist: We have no questions.

(Witness excused.)

Mr. Burch: We will call Mr. Brooks.

ROOSEVELT BROOKS

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please? [283]

A. Roosevelt Brooks.

Q. What do you do for a living?

A. Farm.

(Testimony of Roosevelt Brooks.)

Q. Who do you work for?

A. Mr. Jim Harrison.

Q. You work for Jim Harrison?

A. Yes, sir.

Q. Where do you work?

A. At the lower, the Hassayampa.

Q. Is that in the Harqua Hala Valley?

A. Yes, sir.

Q. Do you know Mr. Bob Thiebeau?

A. Yes, sir.

Q. Do you work with him? A. No, sir.

Q. He works on a different part from you, is that right?

A. Yes, sir. He was working during the time of the flood.

Q. You said he was working with you last year?

A. Yes; during the time of the flood.

Q. You speak up, Mr. Brooks, so we can hear you back here plainly. A. Yes, sir.

Q. You were employed out there in the Harqua Hala Valley last year, is that it? [284]

A. Yes, sir.

Q. Were you out there during the time of the floods and the rains? A. Yes, sir.

Q. Describe to the court, Mr. Brooks, what happened after the rains last year out there? What did the land look like?

A. It looked like just the water went out. It looked just like a desert. It was an awful wash.

Q. Was the drainage out there sufficient to cause any drift, carry any water across the fields, and that sort of thing?

(Testimony of Roosevelt Brooks.)

Let me ask you this: What did it do to the ditches out there?

A. Just washed them flat level.

Q. Do you know who Mr. Otto is?

A. No, sir.

Q. Do you know this gentleman here? Do you recognize him? A. I have saw him.

Q. Your are not personally acquainted with him, I take it? A. No, sir; not personally.

Q. Did you have occasion to hear a conversation between him and Mr. Shahan after the floods last year? A. Yes, sir. [285]

Q. Who was present at that time?

A. Me and Bob Thiebeau.

Q. What, if anything, did Mr. Otto and Mr. Shahan have to say to each other in regard to the flood damage?

A. Oh, he was talking about the irrigation of the rainfall. He says, "That wrecked me."

Q. Who made that statement?

A. A man, that Mr. Shahan was talking to.

The Court: Do you see him here?

The Witness: Yes.

Q. (By Mr. Burch): The man in the blue shirt here? A. Yes, sir.

Mr. Burch: That is Mr. Otto, for your information.

The Court. Is that all?

Mr. Burch: That is all.

(Witness excused.)

Mr. Burch: Your Honor, I have additional witnesses, but they are not available at the moment.

The Court: Have them here Monday afternoon at 2:30.

(Thereupon, an adjournment was taken to Monday, May 21, 1956, at the hour of 2:30 p.m.) [286]

Monday, May 21, 1956, 2:30 P.M.

FRANCIS J. LANCEY

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please?

A. Francis J. Lancey.

Q. Where do you live?

A. In Buckeye, Arizona.

Q. What is your business?

A. I am a welding shop operator.

Q. You operate your own shop?

A. That is right. [287]

Q. How long have you been doing that?

A. Six years in this location, and I have been in this business for 27 years.

Q. Have you had most of your experience in the Buckeye area? A. Ten years.

Q. Are you acquainted with Elmer Shepard seated to my right here? A. I am.

(Testimony of Francis J. Lancey.)

Q. Mr. Lancey, at our request have you had occasion to check your records with regard to any work done for Elmer Shepard in 1954?

A. Yes.

Mr. Burch: May this be marked?

The Clerk: Defendant's Exhibit A for identification.

(Said document was marked as Defendant's Exhibit A, for identification.)

Q. (By Mr. Burch): I will ask you if you had occasion to make a bonnet for him in February of that year, for his well? A. I did.

Q. Is that the receipt that you—is that a bill or statement that you made to him for your work?

A. That is right.

Q. And that was your shop? [288]

A. That is right.

Q. What was the nature of the work you did?

A. We took a piece of round pipe and cut it at angles and made a segment of an elbow for a discharge pipe.

Q. When did you make that?

A. The date is there. I think it is in February of 1954.

Mr. Burch: We offer this in evidence.

Mr. Rehnquist: No objection.

The Clerk: Defendant's Exhibit A in evidence.

(Said document received in evidence and marked as Defendant's Exhibit A.)

(Testimony of Francis J. Lancey.)

Q. (By Mr. Burch): If it is dated February 12, 1954, that would be the completion date?

A. That is the completion date.

Q. Have you ever had occasion to make bonnets before in your shop for discharge pipes?

A. Yes, it is standard procedure for discharge pipes for a pump.

Q. It is not an uncommon occurrence?

A. No.

Q. Have you put them on discharge pipes yourself occasionally? A. Yes.

Q. What is the general purpose of making one of those [289] and putting it on a discharge pump? Or discharge pipe?

A. They have several purposes.

Mr. Rehnquist: We will object until there is some qualification that the witness knows the purpose, as opposed to just the mechanics of putting them on.

The Court: Go ahead, answer.

Q. (By Mr. Burch): What is the purpose?

A. They have several purposes. One purpose would be to divert water in a given direction instead of coming straight out.

Another purpose would be to keep children from throwing rocks down in the bowls. Another purpose would be to back force pressure up onto your cooling system.

The Court: Can you think of anything else.

The Witness: There is several different things they use them for.

(Testimony of Francis J. Lancey.)

The Court: Well, that is enough.

Q. (By Mr. Burch): How about a flange or baffle? Have you ever seen one of those put in a discharge pipe? A. Yes.

Q. What is their usual function?

Mr. Rehnquist: We will object on the same grounds.

The Court: Go ahead. [290]

The Witness: They are just used to give you a momentary back pressure that you can't derive from a butterfly, if you need just a little bit of pressure to cool your gearhead, and you don't want to run into a butterfly, so you back it up with a flange.

Q. (By Mr. Burch): Have you observed those on discharge pipes when wells are running?

A. Yes.

Q. Would that in your observation increase or make an appearance of increase in the supply of water coming out of the discharge pipe?

A. You can't increase water by plugging. You can cause more presure, the more you squeeze it down, the more pressure you will have, but you get less water.

Q. Are you familiar with wells in the Harqua Hala Valley? A. Yes.

Q. Have you worked on discharge pipes in that particular district, you personally? A. Yes.

Q. Have you made an observation as to whether or not these bonnets are common procedure out in that area?

A. There is so many out there, and so many dif-

(Testimony of Francis J. Lancey.)

ferent people put them on. I don't know what other accounts. Our accounts do that. [291]

Q. I notice on this exhibit that this was billed to Elmer Shepard, and then there has been written on here by your office, apparently, the word "Mark." Who would that refer to?

A. That would be his foreman.

Q. You know who he is also, is that correct?

A. Yes, sir.

Mr. Burch: You may cross-examine.

Cross-Examination

By Mr. Rehnquist:

Q. Mr. Lancey, defendant's Exhibit A here represents your invoice for welding a bonnet onto a regular discharge pipe, is that correct?

A. No, sir, it does not.

Q. What does it represent?

A. It represents making a bonnet.

Q. You didn't weld the bonnet on yourself, then, did you? A. No, sir.

Q. And did you or did you not put a flange in the bonnet at the time you made it?

A. No, sir.

Mr. Rehnquist: No further questions.

Mr. Burch: That is all.

(Witness excused.)

Mr. Burch: We will call Mr. Wood. [292]

ERNEST WOOD

called as a witness in behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please?

A. Ernest Wood.

Q. Where do you live now, Mr. Wood?

A. Gila Bend.

Q. What is your occupation?

A. Just farm labor.

Q. How long have you been farming?

A. State of Arizona for 20 years.

Q. Have you ever farmed in the Harqua Hala Valley, or worked for anyone out there?

A. Yes, sir.

Q. Who did you first work for out in that district? A. Mr. Cameron.

Q. When did you start working for him?

A. 1950.

Q. How long did you work in the Harqua Hala Valley, the Harqua Hala area?

A. Well, sir, ever since it first started developing four years ago.

Q. Are you acquainted with Mr. Elmer Shepard seated next [293] to me here?

A. Yes, sir.

Q. Do you know Mr. Otto seated in front of me?

A. Yes, sir.

Q. Do you recall when you first met Mr. Otto?

A. Yes, sir.

(Testimony of Ernest Wood.)

Q. When was that?

A. September of 1954.

Q. Where did you happen to meet him?

A. Out as Ray Stall's place.

Q. Where is Ray Stall's place?

A. Harqua Hala Valley.

Q. What were you doing out there at that time?

A. Ranch foreman for Mr. Cameron.

Q. What was Mr. Otto doing at that particular time?

A. He had some contracting, cotton picking.

Q. Did you see Mr. Otto occasionally after that, or regularly, or how often? A. Yes, sir.

Q. Where did you see him?

A. Well, there on the ranch, and up at the house, Mr. Cameron's place.

Q. Did you ever know that he was interested in purchasing property in that area?

A. Yes, sir. [294]

Q. How did you determine that?

A. Well, at the time when we started his machines out picking, he was talking about the cotton, how good it was, and he said he would just like to own a place out in that particular part of the country.

Q. That was when?

A. The first day that I ever met the man.

Q. Did you ever have subsequent conversations with him about the property out there?

A. Yes, sir, several of them.

(Testimony of Ernest Wood.)

Q. Did you ever discuss the Shepard property with him? A. Yes, sir.

Q. Do you recall when that first came up?

A. Well, that was the first time I ever met the man, we were talking about land out there, and I told him I had heard this was for sale, and he was more than anxious to buy a piece of property in that particular part of the country, and he asked me to find out for him?

Q. Did you do that? A. Yes, sir.

Q. How did you go about that?

A. We talked and discussed the farm and the cotton I had there, which was a very good crop, which was something he wanted this land for, and Mr. Shepard was in bad health at that particular time, and I heard his land was for sale, or [295] he was talking about selling it, and I asked Elmer, and he told me it was.

Q. Did you advise Mr. Otto of that fact?

A. Yes, sir.

Q. Did you ever discuss the Shepard place itself with Mr. Otto at any time? A. Yes, sir.

Q. Do you recall approximately when that was?

A. Oh, well, that was probably at different times during the fall there, which is from the first time I met the man until he bought the place, it was just a steady routine, going over and over every time he was with me, we was talking about the valley and the land, Mr. Cameron's place and Elmer's place. It was adjoining.

Q. Did you ever have any discussion about the

(Testimony of Ernest Wood.)

water supply in that area? A. Yes, sir.

Q. Do you recall when you had that discussion?

A. That was several different times.

Q. Can you recall any of that specifically, when you discussed the wells?

A. One afternoon we were sitting there at home, and we were talking about Mr. Cameron's well.

Q. Who is "we"?

A. Mr. Otto and I. And talking about the wells, and he [296] asked me about these pumps in these wells. He said he was not familiar with them, and he asked me if I was. And I told him I had seen a lot of them pumped in 20 years. He wanted to know if it would go dry. I told him I hadn't seen any go dry yet. You never know. We discussed matters there, and I told him we had a little silt condition there at that particular place, and talked about the gravel packing, and I even started the well for him.

Q. That is Mr. Cameron's well?

A. Yes, sir. And the well was started several different times during the fall, and he was there picking. I had a little alfalfa I had to water several times, and I had to start my motor every other morning, because after you get your regular drawdown of your well—I had an overhead tank for domestic use—so when you get your well drawed down the silt would start.

Q. On this particular occasion when you started the well for him, Mr. Gordon Cameron's well for Mr. Otto, did you have any further discussion about the production of that particular kind of well?

(Testimony of Ernest Wood.)

A. Well, we was talking there on the actual production of the water, that is something I can't tell how much water is coming out of the well, and he said was there enough water there to take care of the cotton crop down there, which was very true, there was enough water there. [297]

Q. Did you ever discuss the silt condition any further with him?

A. The only thing, each time we were talking there there was silt, and he did ask me about what it cost to pull a pump and go into that, so I told him there it would take $1,000 or more, which you had to do on account of this silt would cut the bowls out of the pump.

Q. How do you know it would cost a thousand dollars?

A. We had had this one pulled out, and I had seen several pumps pulled, just the general routine of the farming, you have to do those things. It won't set there forever without being repaired.

Q. Have you ever had any experience with pumps?

A. Yes, sir, I drilled quite a few.

Q. For whom? A. Gordon Cameron.

Q. You had worked with him? A. Yes.

Q. Did you ever discuss Elmer Shepard's well at any time with Mr. Otto? A. Yes, sir.

Q. What, if anything, did you say to him with regard to that?

A. He asked me, "How is Elmer's well in comparison with this one"? [298]

(Testimony of Ernest Wood.)

And I said, "No difference between the wells that I can see. I can't see any difference at all. However, Elmer's well will clear up a little faster than Gordon's will, the silt condition there."

Q. Did you ever know Mr. Ed Diebert?

A. I knew Ed. His last name I couldn't recall, a brother-in-law of Mr. Otto's.

Q. Did he do any work around that area at that time?

A. Yes, sir, he was driving a cotton picker.

Q. Do you know if he ever made any investigation of the prop erty? A. Yes.

Q. What do you know?

A. He was down looking at the soil, and he also taken and got some jars and cans from me to take some soil samples to Mr. Otto to take to California.

Q. Did you know Mr. Haas?

A. I met the man, yes sir.

Q. Do you recall when Shepard sold the property to Mr. Otto?

A. I remember the conversation he had up here at this court that night.

Q. You were present at that time?

A. Yes, sir.

Q. Who was there that evening, if you remember? [299]

A. Well, there was Mr. Shepard, Mr. Otto, Mr. Haas, and Ed, he come in later, the other fellow there, and myself.

Q. Do you recall whether or not on that particular occasion, what the general conversation was, if you can remember, Mr. Wood?

(Testimony of Ernest Wood.)

A. Well, they was talking about the land, but it seemed that Mr. Otto and Mr. Haas, they wanted more cotton base, and Mr. Shepard told them no, he wouldn't let any more cotton go with the place other than what the ground held of its own. So then they kept talking. They talked a little while, and went on, but they still wanted more cotton.

He told them no. Then they said the payment was too high. And Elmer told them, well, he couldn't see any need of cutting his payments down too low, on account of he could lease his land for more or as much as the payments.

He told them he would put some improvements on this place.

Q. Who made that statement about improvements? A. Mr. Otto.

Q. Go ahead.

A. And if he could reduce the payments down they would do some improvement on the place, which was a home, and a half-mile of concrete ditch.

Mr. Rehnquist: We will object to that on the grounds of the parol evidence rule. The Option, and the Escrow Instructions [300] are both in evidence. We feel it shouldn't be varied. We move it be stricken.

The Court: Somebody has testified to that. I can't remember.

Mr. Rehnquist: They have already testified to it twice, your Honor, on questions asked of Mr. Haas.

The Court: It is in the record.

(Testimony of Ernest Wood.)

Mr. Rehnquist: The answer was no, your Honor.

The Court: Before?

Mr. Rehnquist: Yes.

The Court: I don't remember that. All right. It is written in the record. I suppose that would control if it is a written instrument.

Q. (By Mr. Burch): After the deal was closed, did you have any occasion to assist Mr. Otto on the property? A. Yes, sir.

Q. When was that?

A. That was when he first started his pump.

Q. Do you recall approximately when that was?

A. That was in April of 1955.

Q. Who started the pumps, Mr. Wood?

A. I started the pump going myself.

Q. Who laid out the tubes, if any were laid out?

A. There were a number of tubes laid out, and I believe [301] he and Ed laid them out, as far as I know. The tubes were laid out when I got there.

Q. How many tubes were there?

A. There was possibly 100 tubes, or better.

Q. When you started up the pump, did it work?

A. Yes, sir.

Q. What did you do then?

A. Let the water build up a little bit in the ditch, and started the tubes going.

Q. How many did you start? A. 72.

Q. Did you get them all running?

A. Yes, sir.

Q. Did you do any more that particular day, then?

(Testimony of Ernest Wood.)

A. No, just told him, showed him, and tell him how the water was to go, and how it helped to watch it. But he didn't stay. As I recall, he was gone, and he was very pleased with the well, and stood there and told me how proud he was of the place, which it is a nice place, very nice.

Q. Did you have occasion later on to do any more work on the property? A. Yes, sir.

Q. How long after you started it?

A. I believe 10 days or better.

Q. Did you have a chance to observe whether the well [302] was working at that time?

A. Yes, sir.

Q. Did Mr. Otto have a conversation with you about it at that time?

A. Only that he was still happy.

Q. Was it, to your recollection, 72 tubes you started that first day for him?

A. That is right.

Q. Mr. Wood, do you recall ever doing any work on the discharge pipe on that particular pump?

A. Yes, sir.

Q. Do you recall approximately when that was?

A. I believe it was around, it was between the 12th and the 18th of October of 1954.

Q. There has been some testimony that a bonnet and flange were welded on there in February of 1954. Do you know anything about that?

A. It was February, yes, sir. I was the man that done the welding, myself.

Q. Who did you work with on that, if you

(Testimony of Ernest Wood.)

worked with anybody? A. Mark Makin.

Q. What did you do?

A. He wanted just a little hood welded on there, so we welded the hood on. [303]

Q. Did you do any other work besides weld the hood on?

A. Yes, sir. We put a little flange out there. We cut a piece of tin about 3 inches on the bottom, and tapered it off to a piece hitched on the bottom.

Q. Where did you put that?

A. I left a little space at the bottom for this particular little piece of tin to set there, to hold the water up over this cooling system of the pump.

Q. Who requested you to do that?

A. Mr. Makin and I, we were just down there, so we decided it for ourselves. We thought it would be a good idea, and stuck it in there.

Q. That was in February, 1954, is that correct?

A. Yes, sir.

Q. Have you ever seen anything like that before, in your experience? A. Yes, sir.

Q. Is that a common occurrence?

A. That is a common occurrence. You just take and check your valve, and you find those hoods on many a well.

Q. Did you ever have occasion to sound that particular well?

A. Only just this one time we was down there, there was a string hanging in the well, and Mark and I was down there when they had the pump out of it repairing the bowls. [304]

(Testimony of Ernest Wood.)

Q. That was when? A. That was in 1954.

Q. What time in 1954?

A. I believe that was in July.

Q. What did you do in regard to sounding?

A. They had a string hanging there with a weight on it, and there was three balls of twine, so I picked this string up and lifted it up and down in the well, and it was very free.

Q. Do you know how much length of string there was on that?

A. Three balls of twine with 300 feet to the spool. It could have been 300, or maybe a little less or a little more. It was bought for 300 feet of twine.

Q. That would be approximately 900 feet?

A. Right.

Q. Were you there when the floods hit in 1955?

A. Yes, sir.

Q. Where were you working in the valley at that time?

A. I was four miles south and a mile east of Mr. Otto's place.

Q. Did you have the opportunity to observe conditions generally in the valley as a result of those rains? A. I sure did.

Q. What was that condition?

A. It was just a flood had come in there, and it was [305] just pitiful how deep the water was. The valley was a solid lake of water.

Q. What did it do to the property you were working on at that time?

A. It just practically washed it away.

(Testimony of Ernest Wood.)

Q. Who was the owner of that place?

A. Frank Bernard, and Jimmie Fulton, Lon Massingale has the lease on it.

Q. Did you have a chance to observe Mr. Otto's place?

A. No, I didn't get down to Mr. Otto's place, but I was by there shortly afterwards, that is. the upper end, by the corner of his place, then out by Mr. Cameron's place, the only way we could get out at that particular time.

Q. Why was it there was no other way?

A. Too much water. The place was washed away. We couldn't get out. In fact, I was water-bound for three weeks.

Q. You shut your water off, you say?

A. Yes, sir.

Mr. Burch: You may cross-examine.

Cross-Examination

By Mr. Rehnquist:

Q. Would you state again for me the name of your employer last summer? Was it Fulton?

A. Jimmie Fulton, and Frank Bernard. They are the land owners. Lon Massingale was my employer. [306]

Q. And they raised cotton last summer?

A. Yes, sir.

Q. About how many bales to the acre did they make, do you know?

A. They didn't make two bales to the acre.

(Testimony of Ernest Wood.)

Q. How much short of two bales?

A. That I don't know. I never checked into that cotton.

Q. Would you say it was one and three-quarters?

A. Well, approximately a bale and a half.

Q. That was in spite of the rain?

A. Yes, sir. This was stub cotton. It wasn't planted cotton. There was a difference then.

Q. They hadn't planted any cotton, it was just stub?

A. We had gone and replanted, but it was stub.

Q. Would you tell me once more about that spool you put in the well. What was at the end of the twine?

A. On the end of the twine, I didn't see that, sir, but there was—Mr. Makin and Mr. Shepard had tied a spring onto it which was heavy, you know what I mean, you can tell if there is something on the end of anything, and it was very free. I picked the string up myself.

Q. While it was down? A. Yes, sir.

Q. You testified you worked on this discharge pipe; first I believe you said it was the week of October 12th [307]

A. I made a mistake.

Q. Now, it was the week of February 12th to 18tl ?

A. Between the 12th and the 18th. Not the 12th. Between that and the 18th.

Q. How do you remember the day?

A. We was picking cotton out there, to be exact.

(Testimony of Ernest Wood.)

We had the welder out there from the rig of Mr. Cameron's. We welded two trailers, one for Young and one for Elliot, and this welder was there, so we welded the hood on.

Q. They were picking cotton in February?

A. They were picking cotton on this particular place of Mr. Shepard.

Q. How does that happen to remind you of the date, the fact the trailers were welded.

A. Well, they just finished the weld on there, and the welder was there, and I did this welding.

Q. Did you make a mental note that this was the week of February 12th to 18th?

A. No, I didn't make a note that it was February 12th to 18th.

Q. You just recollect it now, is that correct?

A. Well, pretty close, yes.

Q. Did you say you were working for Gordon Cameron in the Harqua Hala Valley in 1950?

A. I was working for Gordon Cameron in 1950. [308]

Q. Not in the Harqua Hala Valley?

A. No, sir.

Q. When did you start working for him out in the valley?

A. In 1954. I believe it was 1954.

Q. How long have you lived there in Buckeye, Mr. Wood? Is it Wood or Woods? A. Wood

Q. How long have you lived in Buckeye?

A. Off and on I have lived in Buckeye for the past 18 years, Buckeye or Gila Bend.

(Testimony of Ernest Wood.)

Q. You are quite well acquainted with Mr. Shepard? A. Yes, sir.

Q. How did you first meet Mr. Shepard?

A. That was sometime ago. I knew Elmer, and have seen the man just like anybody, you know what I mean, and gone more or less like friends, like you or anyone else would meet a man. Sure, you just lived here so long that you just——

Q. How long ago was that? Do you have any idea?

A. I don't have an idea. Quite a ways back.

Q. Would it be ten years you say you have known him? A. Oh, yes.

Q. Do you see him quite frequently?

A. Sometimes it is a year before I see Elmer. Sometimes it has been two or three years before I have seen Elmer.

Q. Do you see him frequently on occasion? [309]

A. Not here lately, no.

Q. On other occasions have you? A. Sir?

Q. At other times, have you seen him frequently?

A. Just when he had the ranch there, we was neighbors. We neighbored quite a bit.

Q. Are you subpoenaed today?

A. I was subpoenaed the 17th.

Q. You were subpoenaed for the 17th?

A. Yes, sir.

Q. Your occupation now is farm laborer?

A. Yes.

Q. How long have you had that job with this particular outfit in Gila Bend?

(Testimony of Ernest Wood.)

A. I went down there a couple of months ago.

Q What did you do before that?

A. I was with Mr. Massingale, and I was out in the valley there for Mr. Harrison a short time.

Q. How long were you with Mr. Massingale?

A. One year.

Q. With Mr. Massingale one year, and how long were you with Mr. Harrison?

A. I was there, and got another boy started with Mr. Harrison a little over two weeks.

Q. Who were you with before that? [310]

A. Mr. Cameron.

Q. And you were with Mr. Cameron about four years?

A. I was with Mr. Cameron from the spring of 1950.

Q. Who are you with now?

A. United States Government on the border of Mexico.

Q. How long were you on the border?

A. Two years.

Q. What did you do before that?

A. I was ranch foreman at Gila Bend for Mr. Sisson, worked for Mr. Sisson ten years.

Q. You had occasion to help Mr. Otto start the water in the spring of 1955? A. Yes, sir.

Q. How long were you over there that first day?

A. I was there long enough to start the pump and get the hose to running.

Q. Give me some estimate of time.

(Testimony of Ernest Wood.)

A. Probably three hours. When I got the hose to run I stayed around probably three hours.

Q. It was ten days after that you came back?

A. Yes, sir.

Q. You weren't there at all in the intervening period?

A. I was just across the fence several times, until I left Mr. Cameron and went over to Mr. Massingale's.

Q. Could you see across the fence the number of tubes [311] Mr. Otto had out? A. Yes.

Q. About how far is that?

A. From the fence to where his ditch was?

Q. Yes.

A. Approximately a couple hundred feet.

Q. Did you say there was water going through 72 tubes? A. Yes, sir, two-inch tubes.

Q. And did that continue for all of the three hours you were there? A. Yes, sir.

Q. You don't know how much, you don't know how many tubes were running after you left, I suppose? A. I didn't go back and check.

Q. Mr. Wood, how did you happen to be present at the motel that night of the conversation you have described to us about Mr. Otto buying Mr. Shepard's property?

A. Mr. Otto and Mr. Haas was out there, and I was there when they was talking about the deal, so they invited us in, so I went in with Elmer.

Q. You came in with Elmer? A. Yes, sir.

(Testimony of Ernest Wood.)

Q. When those 72 tubes started up, Mr. Wood, did you see any of them at all stop?

A. Yes, sir. [312]

Q. How many of them?

A. There was just a very few which they didn't let the water raise high enough in the ditch. They started to start the tubes a little too fast. Then you have always got to go and regulate your water, regardless.

Q. Some of those tubes did start?

A. Yes. I started them all, and they were all running.

Q. Then they stopped after that?

A. When I left, there was 72 tubes running.

Q. They were all running water through them?

A. Yes.

Mr. Rehnquist: That is all.

Redirect Examination

By Mr. Burch:

Q. Did you have occasion to assist Mr. Otto in starting his cultivator?

A. His furrowing out rig, yes. They wanted to rig up the cultivator, and they wanted to furrow out, so I was helping them.

Q. When was that?

A. About ten days after I started his pump I was over there.

Q. To rig the cultivator?

A. Mr. Shepard's brother flew in that afternoon

(Testimony of Ernest Wood.)

I was there and picked Mr. Otto up and flew him back to Buckeye. [313]

Q. They had already been working on it?

A. They had probably 8 or 10 rows ahead of it, so they asked me to come over and rig up the furrowing out rig.

Q. What was the purpose of that?

A. So they could run more water for their planting purposes.

Q. At that time they had enough water?

A. Yes, sir, they were water happy.

Q. That is all you saw, 2-inch tubes? Were there any stoppers in those tubes?

A. When I got down there we'd taken all those out. Mr. Otto helped me pull those inch-and-a-half plugs out of those 2-inch tubes.

Q. So you were running full 2-inch tubes?

A. Full 2-inch tubes.

Mr. Burch: That is all.

Mr. Rehnquist: We have no further questions.

Mr. Burch: May the witness be excused?

The Court: He may be.

(Witness excused.)

LYMAN MILLER

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch: [314]

Q. Will you state your name, please?

A. Lyman Miller.

Q. Where do you live, Mr. Miller?

A. Phoenix, Arizona.

Q. What is your occupation?

A. I would say I am a mechanic.

Q. Who do you work for?

A. Arizona Engine and Pump Company?

Q. What kind of work do you specialize in?

A. Mostly in pump and gearhead work.

Q. Do you recall doing some work on the pump at Elmer Shepard's farm in late July of 1954?

A. I do.

Q. I have a statement here from State Tractor with regard to that work. That was the job you did, is that correct?

A. That is right. We pulled it out and overhauled the bowls.

Q. What was the nature of the work you did on that pump at that time?

A. Well, we replaced the impellers and the shafting and the bearings in the bowl, and did some line shaft work on it.

Q. You personally either did the work or oversaw it done, is that correct?

(Testimony of Lyman Miller.)

A. I did the bowl work, yes.

Q. All that work was done in your shop? [315]

A. Absolutely.

Q. Who reinstalled it, then, in the well?

A. At that time, State Tractor's boys.

Q. And did you have occasion to see how it worked after it was reinstalled? A. I did.

Q. Had you ever seen that well before, Mr. Miller? A. I had.

Q. When did you first observe it?

A. When it was new, first put in, and I installed it.

Q. You had charge of the pump work at that time, too, is that correct?

A. I wouldn't say in charge of it. I am more or less troubleshooter for them, look after stuff like that.

Q. Had you had other occasions in 1953-1954 to see that particular well? A. Yes.

Q. You were familiar with it? A. Yes.

Q. After the installation and repair work you did in July, 1954, did you see the well when it was turned on and the water pumping? A. Yes.

Q. Was there a difference between the appearance of the water and its production at that time, and your other observations [316] of it?

A. Not that could be noticed.

Q. Would you say that was a complete overhaul of the pump?

A. Yes, I would say that was a complete job.

(Testimony of Lyman Miller.)

Q. What actually is done to restore a pump in a case like that?

A. It is pulled out, the line shaft checked, the bearings checked, and the bowls opened up. They are assembled, each bowl in itself is an assembly, and they are all pulled apart and inspected, and any parts that can be replaced up to as good as new is replaced.

Q. Did you do that on this particular job?

A. We did.

Q. Were you satisfied with your work?

A. Yes.

Q. Is there any basis on which you can judge how long such a repair job will last, Mr. Miller?

A. No, there isn't any that I could base on it. There is several conditions to take into consideration.

Q. Did you ever have another occasion to observe that particular well and pump?

A. Not after it was started, when it was overhauled.

Q. Did you have any occasion in 1955 or 1956 to look it over? [317] A. No.

Mr. Burch: You may cross-examine.

Cross-Examination

By Mr. Rehnquist:

Q. You didn't replace the bowls in July, 1954, did you, Mr. Miller? A. The bowl itself?

Q. Yes. A. No, sir.

(Testimony of Lyman Miller.)

Q. Did you see the pump installed in the well immediately before it was pulled for this job?

A. You mean when it was first installed?

Q. No, sir. Immediately before this job in July of 1954, did you have occasion to see the well in action?

A. No, I never seen the well pumped.

Q. At that time, you mean, or did you ever see the well pumped?

A. I have seen the well pumped.

Q. But not at that time?

A. Not just immediately before the pump was pulled.

Mr. Rehnquist: We have no further questions.

Mr. Burch: May the witness be excused?

The Court: He may be.

(Witness excused.)

Mr. Burch: Mr. Kimes. [318]

WILLIAM KIMES

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Will you state your name, please?

A. William Kimes. K-i-m-e-s.

Q. What is your job?

A. I am a service man.

Q. Who do you work for?

(Testimony of William Kimes.)

A. Arizona Engine and Pump Company.

Q. How long have you been employed with them? A. Since a year ago November.

Q. Who did you work for prior to that?

A. State Tractor and Equipment Company.

Q. Those two organizations are side by each out here at 17th Avenue, aren't they?

A. More or less, yes.

Q. Your company formerly was with State Tractor, is that right? A. That is right.

Q. Did you have occasion in your capacity as a service man to ever go to the farm of Elmer Shepard during the years 1953 and 1954?

A. Yes, sir. [319]

Q. What was the nature of your contract for work, what did you do?

A. Primarily check service on the engine.

Q. How often did you do that during the 1954 season?

A. At the time we had it set up for a two-week check out in that area. With a rainy condition like it was at the end of the year, it figured out about once a month checking service on it.

Q. How about the pump, how often would it be checked?

A. Well, that was about every three weeks or once a month check service on the engine itself.

Q. When you went out to see his equipment, what did you do?

A. Check, set the valves, mag, gas pressure, gas

(Testimony of William Kimes.)

mixture, take care of any other trouble, any other trouble I would see.

Q. Did you routinely do that with the Shepard equipment? A. Sure.

Q. To your personal observation, in what kind of repair was that equipment kept?

A. It was in pretty good shape.

Mr. Burch: Cross-examine.

Cross-Examination

By Mr. Rehnquist:

Q. Did anything ever go seriously wrong with that engine, [320] Mr. Kimes?

A. Seriously, it is a hard statement to make clear to people that don't know engine kind of work. We had one head that would either burn a valve or drop a valve. I wasn't on that job. It was in the first season, under warranty from the manufacturer.

Q. That would have been in 1953?

A. It was the first year, I believe, but other than that it was just minor tune-up work, mostly.

Q. Other than that, it was just minor standard service operation? A. That is right.

Mr. Rehnquist: We have no further questions.

(Testimony of William Kimes.)

Redirect Examination

By Mr. Burch:

Q. There was, as I understand, someone did the checking prior to your time with the company?

A. Yes, sir. Actually, I think I made, according to the records, I think I made about three checks when we first installed the engine, and the one salesman that was working with us at that time made four checks after that, and the rest of them I have taken care of.

Q. It was your procedure, then, I take it, if anything was needed, to furnish it, is that correct?

A. That is right. [321]

Q. That was whether Mr. Shepard was there or not? A. That is right.

Q. And did you do that?

A. I certainly did.

Mr. Burch: That is all.

Mr. Rehnquist: That is all.

(Witness excused.)

The Court: We will have our afternoon recess.

(Afternoon recess was taken.)

The Court: You may continue.

Mr. Burch: Your Honor, I would like to recall Mr. Miller for just one more question.

The Court: All right.

LYMAN MILLER

recalled as a witness in behalf of the defendants, having been previously duly sworn, testified as follows:

Further Direct Examination

By Mr. Burch:

Q. Mr. Miller, did you ever have occasion to consult with Mr. Mark Makin in regard to that particular pump you have testified you worked on on occasion?

A. Yes, I have talked to Mark about it.

Q. Do you recall when that was, approximately?

A. Well, that was sometime before 1954.

Q. The well went in in 1953, as I understand it, is that [322] right? A. That is right.

Q. Did you have occasion to discuss with him specifically cooling the gearhead?

A. I think I have.

Q. Can you tell us what you advised him in that respect?

A. Mark mentioned to me that the gearhead was running awful hot, and in that particular head we have a cooling coil there to cool it. I suggested that to get more water up there and better cooling, that he form a pressure on the head, to get better cooling.

Q. How did you advise him to do that?

A. I advised him on the butterfly deal, where you could pull the butterfly around and crowd it and form a pressure, or he could use a siphon to

(Testimony of Lyman Miller.)

siphon the water through the head, or he could put a pipe in it.

The pipe would be inside of the discharge pipe right in front of the pump head, and would be sticking into the flow of the water, so it would create a pressure as the water flowed through the discharge pipe, and create pressure in the head.

Q. The object was to get an obstruction in the pipe to back up the water to cool the gearhead?

A. There had to be something to create pressure on the head, some kind of a device in order to cool the head.

Mr. Burch: That is all. [323]

Mr. Rehnquist: We have no questions.

Mr. Burch: Thank you, Mr. Miller.

(Witness excused.)

Mr. Burch: Mr. Shepard.

ELMER F. SHEPARD

called as a witness in behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Burch:

Q. Mr. Shepard, I believe you have testified previously under cross-examination, is that correct?

A. Yes.

Q. Recalling now the year of 1954, do you recall your first serious conversation with either Mr. Otto

(Testimony of Elmer F. Shepard.)

or anyone else with regard to the sale of your property?

A. The first serious conversation was in the motel at Buckeye.

Q. Did you have a prior conversation on your property with Mr. Otto?

A. A short conversation, yes.

Q. What were the circumstances regarding that? What were you doing that particular day?

A. I was busy picking cotton and hauling the cotton in, and so we made a date for later to meet, at a later time.

Q. And that date was that evening, is that correct? [324] A. That evening of that day.

Q. Had you had a notice that Mr. Otto and Mr. Haas were coming out on that particular date to see you? A. No.

Q. Had they ever advised you before that time they were contemplating buying your property?

A. No, other than at one time Mr. Otto had asked me what I wanted for it, but he didn't make any further commitment.

Q. And you met them that evening in the motel?

A. That is right.

Q. And as I understand, the Option was signed the next morning? A. Yes.

Q. That all took place approximately with a 24-hour period, is that correct? A. Yes.

Q. That was your total negotiations with them?

A. That is it.

Q. Had you made any offers or inducements with

(Testimony of Elmer F. Shepard.)

them to purchase your property prior to that time?

A. Any what?

Q. Any offers to them? Had you made any offers to them at all? A. No.

Q. And when you met at the motel with them, who was present? [325]

A. Mr. Haas and Mr. Otto, and Ernest Wood, and myself, and then this other brother-in-law was there part of the time, Ed Diebert, or Diebert.

Q. Did you ever at any time make any guarantees to them as to the production of the well?

A. No, sir.

Mr. Rehnquist: We object. It calls for a legal conclusion. I ask that it be stricken.

The Court: All right. State what was said.

Q. (By Mr. Barch): What did you say with regard to the production of your well, Mr. Shepard, if anything?

A. I told them that I couldn't estimate that, that they could count the tubes, and they might come to a conclusion by the number of tubes.

Q. Did you ever give them any approximation of the number of tubes you used on your property?

A. Yes.

Q. What was that?

A. Well, we usually start with 70 or better, and as the season progresses, we would reduce down a heavier flow of water.

Q. How long a row did you irrigate out on your property? A. A mile.

Q. Is that a normal length to irrigate? [326]

(Testimony of Elmer F. Shepard.)

A. No, it is not. It is about double what is usually irrigated, or maybe four times as long, probably.

Q. How many acres did you plant in 1953 out there? A. Let's see. 1953, 211 acres.

Q. And in 1944?

A. Let's see. 1953 was 320. And 1954 was the next year. It was 211.

Q. How did you irrigate that acreage?

A. With the well.

Q. Did you ever use water from any other source?

A. Yes, I used water on the 1954 crop from Gordon Cameron.

Q. For how long a period was that?

A. I don't remember exactly. Probably ten days. We were a little behind. We buckled the two wells together after we had it reinstalled.

Q. Did you get a crop that year, in 1954?

A. Yes.

Q. What was the condition of your well as you observed it at the end of the 1954 season?

A. Good condition.

Q. Did you use it at all between the end of 1954 and spring of 1955, when Mr. Otto took over?

A. No.

Mr. Burch: I think that is all. [327]

(Testimony of Elmer F. Shepard.)

Cross-Examination

By Mr. Rehnquist:

Q. Did you use water from anybody in 1953, Mr. Shepard? A. Yes.

Q. Who was that?

A. That was Jimmie Harrison.

Q. How many bales to the acre did you make in 1953?

A. I don't have that record. I had a tenant farmer at that time.

Q. Was it as much as one bale to the acre?

A. I couldn't say, because I actually don't know.

Q. Have you previously testified in a deposition that it was three-quarters of a bale to the acre?

A. It could have been. I don't know exactly.

Q. Are you familiar with the expression "head" when it is used in connection with the siphon tubes?

A. How was that again?

Q. Are you familiar with the expression "head" at which a siphon tube is being run?

A. No, I don't believe so.

Mr. Rehnquist: I have no more questions.

Redirect Examination

By Mr. Burch:

Q. You haven't received your payment this year under the terms of your contract, have you? [328]

A. No.

Mr. Burch: That is all.

(Testimony of Elmer F. Shepard.)

Recross-Examination

By Mr. Rehnquist:

Q. You did receive your payment, did you not, of $2,000 on the Option, and $18,000 from the title company for last year?

A. $2,000 plus 18,000, that is right.

Mr. Rehnquist: That is all.

Mr. Burch: That is all.

(Witness excused.)

Mr. Burch: We rest, your Honor.

The Court: Any rebuttal?

Mr. Rehnquist: Yes, we will call Mr. Otto on rebuttal.

ERNEST OTTO

called as a witness, for rebuttal, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Rehnquist:

Q. Mr. Otto, you have heard Mr. Wood's testimony this afternoon? A. Yes.

Q. You heard him testify you stated you were pleased with the property in April, 1955?

A. Yes, I heard him say that. [329]

Q. And you heard him testify they were running 72 full tubes of water in April, 1955?

A. Yes.

(Testimony of Ernest Otto.)

Q. Did you ever make a statement about being pleased with the property, to Mr. Wood?

A. No, it was just the opposite.

Q. What did you say to Mr. Wood?

A. After I found out it wouldn't run as many pipes as they told me it would, I told him it looked like I got hooked on this place.

Q. How long have you been farming, Mr. Otto?

A. About 20 years.

Q. Is it ordinarily necessary for you to call somebody in to hook up a cultivator for you?

A. No, I don't believe so.

Q. You are capable of doing that yourself?

A. That is right.

Q. I believe you have testified earlier that as of June first, you expected a crop of about two and a quarter bales to the acre? A. That is right.

Q. If that crop had materialized, would you have spent any more money in cultivation of the crop than you did? A. No.

Q. What added expenses would you have been put to if [330] the full crop had materialized, that you weren't put to with the crop as it was?

Mr. Burch: If the Court please, I think it calls for an impossible conclusion.

The Court: Can you answer the question?

The Witness: Yes. The only added expenses I can think of is hauling additional cotton to the gin.

Q. (By Mr. Rehnquist): And what is the cost of that?

A. About a quarter of a cent a pound.

(Testimony of Ernest Otto.)

Q. And how many pounds of cotton is it generally necessary to haul to the gin in order to get a bale of cotton from the gin?

A. With machine-picked cotton, roughly 1,400 pounds.

Q. And was your cotton machine-picked?

A. That is right.

Q. Did you use the same ditch that had been on the Shepard property the previous year for your irrigations?

A. No, it wasn't the same ditch.

Q. How did you take care of it, then?

A. We worked it down and prepared the ground, and planted the crop, and then I rebuilt the ditch, but it was a ditch just like Mr. Shepard had used.

Q. It had the same dimensions? [331]

A. Roughly, yes.

Q. What would you say was the maximum head, using that ditch, that one could get for a siphon tube?

Mr. Burch: If the Court please, this man has already testified he couldn't even estimate the output of a well. I don't think he could testify to what a ditch would be that he never used.

The Court: He may answer.

The Witness: I would say about 8 inches.

Mr. Rehnquist: No more questions.

(Testimony of Ernest Otto.)

Cross-Examination

By Mr. Burch:

Q. You knew that ditch had been used the year before, didn't you, Mr. Otto?

A. Which ditch?

Q. The one that went from the Cameron property down to yours? A. Yes.

Q. And you knew Mr. Shepard had used that at the time for his cotton crop?

A. Part of the time, yes.

Q. I think you stated your cost of picking and hauling would have been a quarter a cent a pound?

A. No, I didn't. [332]

Q. What was that quarter a cent a pound?

A. Hauling that cotton to the gin.

Q. And you would also have had additional expense of pickers?

A. No. If I run the pickers through at one and a half on those bales, it wouldn't cost any more money.

Q. You stated you could operate that rig?

A. That is correct.

Q. You are familiar with what they sometimes call the tumblebug plow? A. That is right.

Q. Do you remember you were out there and pulled the string, and plowed yourself down the furrow?

A. Yes. I didn't pull the string. Someone else pulled it.

(Testimony of Ernest Otto.)

Q. Mr. Wood did come over and hook that rig up for you, didn't he?

A. No, absolutely not.

Q. As a matter of fact, it was Mr. Cameron's rig? A. No, we used our own rig.

Q. You used your own rig?

A. We used Gordon Cameron's planter, not the rig.

Q. Did Mr. Wood show you about that?

A. He showed us about that, because it was a Case tractor, and I never used a Case tractor [333] before.

Q. I think you have testified you drilled a new well on the property?

A. I had it drilled, yes.

Q. And you brought water in at that time for use in drilling the well, isn't that true?

A. No, not me.

Q. Who did? A. Mr. Cameron.

Q. He brought in the water the same as he had brought it in before from his place? A. No.

Q. How was that done?

A. He let it in from a different direction altogether.

Q. Do you recall now the conversation with Mr. Wood in regard to the silt condition of the wells out there in that area?

A. No, I do not recall that.

Q. You do not recall that? A. No.

Q. Do you recall your brother-in-law getting soil samples from the Shepard property?

(Testimony of Ernest Otto.)

A. Yes, he brought them in to me one day.

Q. That was prior to you and Mr. Haas' conversation with Mr. Shepard, wasn't it?

A. I believe it was, yes. [334]

Q. And it is true, is it not, that when you and Mr. Haas came over you had never had any real conversation prior to that time with Mr. Shepard, with regard to the purchase of the property?

A. We had talked about it, and he told me what he wanted.

Q. You never made any offer? A. No.

Q. So when you and Mr. Haas arrived on the 17th of November with $2,000 in your pockets, that was the first real negotiation you ever went into?

A. That is right.

Q. Those negotiations were closed the following morning? A. Following what morning?

Q. You got the option and everything the following morning in Buckeye?

A. That is right.

Q. And then Mr. Haas left immediately for California? A. That is right.

Q. Did you go back with him?

A. Yes, I believe I did.

Q. And you were both in a hurry to close that deal, weren't you, at that particular time?

A. I don't know that we were in a hurry.

Q. You got Mr. Shepard into the motel that evening and discussed the deal, took him to a lawyer the next morning, [335] isn't that true?

A. No, he took us to the lawyer.

(Testimony of Ernest Otto.)

Q. You dictated the terms of that agreement, didn't you? A. No, Mr. Shepard did.

Q. He did all by himself?

A. To Mr. Towner, that is right.

Q. As a matter of fact, you paid Mr. Towner that day, and have employed him since that time, haven't you? A. How was that?

Q. You paid Mr. Towner that day, and have employed him since that time, haven't you?

A. I still didn't get that question.

Q. Strike it. You and Mr. Haas on your arrival here had already decided in your minds to purchase that property, didn't you?

A. Well, half way. We were going to find out about the deal and what kind of terms it could be bought on.

Q. Your interest was in the finances of the transaction at that time, wasn't it?

A. Partly, yes.

Q. You had already told your friends in California you were going to buy the property if it could be bought?

A. The main thing we wanted to do was check up on the water phase.

Q. You hadn't done that in all your prior investigation? [336]

A. No, because I didn't have the money to buy the ranch.

Q. How long had Mr. Haas been working on it?

A. I would say he worked on it about a week after I told him there was a ranch over here that

(Testimony of Ernest Otto.)

was for sale. I didn't know what it could be bought for, or anything. Then he got several friends and got some money.

Q. When did you tell him what it could be bought for?

A. I told him Elmer asked $80,000 for the place.

Q. When did you tell him that?

A. I don't remember the date when I told him, but when we were talking about the deal.

Q. When you came over you were prepared to pay $80,000 for the property as it was, weren't you?

A. I guess, yes.

Q. And on that 17th and 18th, the day you arrived and looked the property over, and the next morning when you drew the Option, your only investigation of the deal was your conversation with Mr. Shepard, isn't that true?

A. Not just the conversation, no.

Q. What else did you do?

A. We looked over the ranch, and Elmer started the well for us, and we just looked the whole place over.

Q. You subsequently had talked to Mr. Cameron and Mr. Wood and Mr. Swindle about the property?

A. That is right. [337]

Q. You had been observing it some three months?

A. No, I didn't observe it three months.

Q. You had been on the property?

A. Twice, I believe.

Q. Mr. Thiebeau was on the property several times?

(Testimony of Ernest Otto.)

A. I believe he was there once when he got soil samples for me.

Q. You had been advised by other people in the community what it would produce in the way of cotton crop?

A. No, not what it had produced, what it was capable of producing. He said Elmer never raised a crop there.

Q. He never made any statements as to productivity of the land? A. No.

Q. And you observed yourself the kind of crop that was on it? A. Yes.

Q. You have since the time that you purchased the property had an offer from Mr. Cameron to buy it for just what you have got in it, isn't that right?

Mr. Rehnquist: I object to the question as irrelevant and immaterial on measure of damages.

The Court: He may answer.

The Witness: Yes, he offered to buy it after it had a good well. [338] Before that he said he wouldn't pay the price on desert land.

Q. (By Mr. Burch): When did he tell you that?

A. I don't remember the date. It was prior to the new well.

Q. Do you recall when you had the conversation with him?

A. It was during the summer, this past summer.

Mr. Burch: That is all.

Mr. Rehnquist: No questions.

(Witness excused.)

Mr. Rehnquist: Your Honor, the only remaining evidence is, and we would like to stipulate to it, rather than read it in evidence, is the deposition of Mr. Shepard. Rather than read it in, since it is being tried by the Court, we would like to stipulate that it is part of the evidence.

The Court: All right.

Mr. Rehnquist: That is all we have. We rest.

Mr. Burch: That is all we have.

The Court: How long do you want. Twenty, twenty, and ten?

Mr. Rehnquist: All right, your Honor.

Mr. Burch: That is all right.

The Court: All right, the Court will stand at recess.

(Case submitted.) [339]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 25th day of January, A. D. 1957.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed January 25, 1957. [340]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Cal-Nine Farms, a corporation, Plaintiff, vs. Elmer F. Shepard, et ux., Defendants, numbered Civ—2343 Phoenix, on the docket of said court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached copies of minute entries, and of docket entry of January 10, 1957, are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated and the same are as follows, to wit:

1. Complaint.
2. Answer.
3. Amended Complaint.

4. Amended Answer, as shown in transcript (pages 2 and 3 of Reporter's Transcript of Record).

5. Minute entries of May 17, May 18 and May 21, 1956 (proceedings of trial).

6. Reporter's Transcript of Record.

7. Minute entry of November 23, 1956 (Order for Judgment).

8. Plaintiff's Proposed Findings of Fact and Conclusions of Law (being the same as document No. 11).

9. Defendants' Objections to Proposed Findings of Fact and Conclusions of Law.

10. Minute entry of January 10, 1957 (Order overruling objections to findings, etc.).

11. Findings of Fact and Conclusions of Law.

12. Clerks' Civil Docket Entry of Judgment, January 10, 1957.

13. Motion for New Trial.

14. Minute entry of March 1, 1957 (Order denying motion for New Trial).

15. Notice of Appeal.

16. Statement of Points on Appeal.

17. Deposition of Elmer Shepard.

18. Order Extending Time to File Record and Docket Appeal, dated April 15, 1957.

19. Stipulation Designating Record on Appeal.

I further certify that the original exhibits admitted in evidence are transmitted herewith as a part of this record on appeal, as designated, to wit:

Plaintiff's Exhibits 1 to 19, inclusive.

Defendants' Exhibit A.

Witness my hand and the seal of said Court this 12th day of June, 1957.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

Memorandum of Clerk's fees for preparing record on appeal, charged appellants: $4.00.

[Endorsed]: No. 15599. United States Court of Appeals for the Ninth Circuit. Elmer F. Shepard and Kathryn Shepard, His Wife, Appellants, vs. Cal-Nine Farms, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Arizona.

Filed: June 14, 1957.

Docketed: June 24, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 15599

ELMER F. SHEPARD and KATHRYN M. SHEPARD, His Wife,

Appellants,

vs.

CAL-NINE FARMS, a Corporation,

Appellee.

APPELLANTS' STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY UPON THEIR APPEAL

The appellants above named, who have perfected an appeal to this Court from the judgment of the United States District Court for the District of Arizona, rendered January 10th, 1957, and the Order of said District Court denying said appellants-defendants' Motion for New Trial, which said Order was entered March 1st, 1957, intend to rely upon the following points upon their appeal to this Court:

1. The District Court did not have jurisdiction in the matter because the plaintiff-appellee was not a proper party plaintiff.

2. Such judgment is not justified by the evidence, and is contrary to law.

3. The District Court has not made adequate findings of fact upon the issues and pleadings of evidence.

4. The Findings of Fact proposed by the plaintiff-appellee and signed by the District Judge do not warrant the Conclusions of Law made and signed by said District Judge and do not support the judgment.

5. Plaintiff-Appellee's Findings of Fact Nos. 2, 4, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17 and 18 are not supported by any evidence, competent or otherwise.

6. Conclusions of Law Nos. 1, 2, 3, 4 and 5, proposed by the plaintiff-appellee and settled and signed by the District Judge do not, nor does one or more of them, contain a correct statement of the law applicable to the factual situation presented by the evidence.

7. The District Court failed to apply the proper measure of damages.

KRAMER, ROCHE & PERRY,

By /s/ F. H. BURCH,

Attorneys for Appellants.

[Endorsed]: Filed June 24, 1957.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 893

ELMER F. SHEPARD AND KATHRYN M. SHEPARD, HIS WIFE,

Petitioners,

vs.

CAL-NINE FARMS, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

ALLAN K. PERRY,
858 First National Bank Bldg.,
Phoenix, Arizona,
Attorney for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

ELMER F. SHEPARD AND KATHRYN M. SHEPARD, HIS WIFE,

Petitioners,

vs.

CAL-NINE FARMS, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

I

Petition

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered upon the appeal of the above named petitioners from a judgment of the United States District Court for the District of Arizona, against such petitioners in favor of the above named respondent.

II

Citations to Opinions Below

1. There was no written opinion by the District Court.
2. At the time this petition is prepared, the opinion of

the United States Court of Appeals for the Ninth Circuit has not been reported. A copy of such opinion is hereto annexed, marked "Exhibit A."

III

Jurisdiction

1. Plaintiff in the District Court (appellee in the Court of Appeals; respondent here) invoked the jurisdiction of the District Court under Section 1332 of Title 28 of the United States Code; the plaintiff being a corporate citizen of California, defendants being individual citizens of Arizona, and the amount in controversy exceeding three thousand dollars, exclusive of interest and costs.

2. Appellants in the Court of Appeals (defendants in the District Court; petitioners here) invoked the appellate jurisdiction of that Court under Section 1291 of Title 28 of the United States Code.

3. The judgment of the Court of Appeals was entered January 31, 1958. Petition for rehearing was filed February 27, 1958, and denied March 10, 1958. An order staying issuance of mandate was entered March 13, 1958, by the terms of which the mandate of the Court of Appeals is stayed, provided this petition for certiorari be filed in the Supreme Court of the United States on or before April 18, 1958.

4. It is believed the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Appeals under Section 1254(1) of Title 28 of the United States Code.

IV

Question Presented

Is the decision of the Court of Appeals, to the effect that respondent met the requirements of the Arizona law with

respect to measure of damages, in direct conflict with the decisions of the Arizona Supreme Court upon the same subject?

V

Statement of the Case

The statement of the case contained in the opinion of the Court of Appeals follows:

> "This appeal is from a judgment awarding damages for false representations found to have been made by appellant Elmer Shepard, which induced the purchase by appellee corporation of a farm or ranch in Arizona belonging to Shepard.
>
> "One Otto, a resident of California, became interested in the farm, which he learned was for sale at a price of $80,000. Not having himself sufficient money to finance the acquisition, Otto returned to California where, with the help of one Haas, his brother-in-law, he interested seven other persons in the Fresno area in the venture. These individuals agreed to put up part of the money for the purchase if the ranch, after further investigation by Otto and Haas, met with their approval. The group consulted a lawyer, and were advised that the best way to handle such a transaction was to incorporate. Otto, accompanied by Haas, returned to Arizona with $2,000 'earnest money' contributed pro rata by the nine interested parties. They met with Shepard at the farm, and during the course of discussions with him the representations alleged in the complaint in this case were made concerning the history, quality, and output of a well on the farm which provided water essential to irrigate cotton—the crop in which the proposed purchasers were interested. An option agreement was thereafter executed between Shepard on the one hand and Otto and Haas on the

other, secured by the payment of the $2,000. Shepard was told that a corpration, still to be formed, would take up this option, and to this he expressed no objection.

"Some three months following this transaction appellee Cal-Nine Farms was incorporated. A few days later escrow instructions were issued to a Phoenix bank embodying the option agreement, naming Shepard and his wife as sellers and appellee as purchaser. The sum of $18,000 was paid upon the execution of the escrow instructions and arrangements made for the payment of the balance of $60,000 over a term of years. Otto, as president of Cal-Nine, went into possession of the ranch three months later, that is, in March of 1955.

"During that year it was discovered that the well was greatly inferior in output as compared with the representations appellants had made for it. Because of the shortage of water the cotton crop of the year suffered heavy damage, and in the following year an adequate well was sunk.

"Cal-Nine Farms brought this suit for damages for false representation in May of 1956. * * * The case was tried to the court * * * sitting without a jury, and damages were awarded in the amount of $35,106, approximately two-thirds of which was for expense of drilling an adequate well, and the balance for crop damage suffered in 1955."

One of the Circuit Judges, Honorable Walter L. Pope, in a special concurring opinion (emphasis supplied by petitioners) stated:

"The only problem that appears difficult to me is whether the trial court in assessing the damages was in error in not applying literally the standard set forth in Lutfy v. R. D. Roper & Sons Motor Co.,

57 Ariz. 495, 115 P.2d 161, 165. *Instead of taking testimony as to the value of the ranch as it actually was, and the value it would have had had the representations been true, the trial court took a short cut by fixing this part of the damages as the cost of a new well.*"

VI

Reasons for Granting the Writ

To petitioners it appears, and they so urge, the decision of the Court of Appeals is one as to which state laws and decisions are applicable, and that there is a direct conflict between the decision of the Court of Appeals and the decisions of the highest court of the State of Arizona.

The trial court did not follow the Arizona rule with respect to the measure of damages. This was noted in the special concurring opinion of Judge Pope, when the case was before the Court of Appeals, hereinabove mentioned.

It is submitted the Arizona Supreme Court has never sanctioned any such "short cut" in measuring damages for fraud.

The highest court of Arizona has repeatedly held the measure of damages sustained by a purchaser where the purchase has been induced by fraud, is the difference between the real value of the property purchased and the value it was represented to have, as appears from the following decisions:

Wooley v. *Locarnini*, 18 Ariz. 539, 164 P. 319.
Curry v. *Windsor*, 22 Ariz. 108, 194 P. 958.
Ren v. *Jones*, 38 Ariz. 476, 1 P.2d 110.
Hidalgo v. *McCauley*, 50 Ariz. 178, 70 P.2d 443.
Lutfy v. *R. D. Roper & Sons*, 57 Ariz. 495, 115 P.2d 161.
Wadell v. *White*, 56 Ariz. 420, 108 P.2d 565, 56 Ariz. 525, 109 P.2d 843.

It is most respectfully insisted the decision of the Court of Appeals, review of which is here sought, is in direct conflict with the decisions of the Supreme Court of Arizona above cited, and that this is a case where the state law is controlling.

VII

Conclusion

For the foregoing reasons it is most respectfully requested the petition for certiorari be granted.

Respectfully submitted,

ALLAN K. PERRY,
858 First National Bank Bldg.,
Phoenix, Arizona,
Attorney for Petitioner.

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,599

Jan. 31, 1958

ELMER F. SHEPARD AND KATHRYN M. SHEPARD, HIS WIFE, APPELLANTS,

vs.

CAL-NINE FARMS, A CORPORATION, APPELLEE

Appeal from the United States District Court for the District of Arizona

Before: HEALY, POPE, and LEMMON, Circuit Judges.

HEALY, Circuit Judge.

This appeal is from a judgment awarding damages for false representations found to have been made by appellant Elmer Shepard, which induced the purchase by appellee corporation of a farm or ranch in Arizona belonging to Shepard.

One Otto, a resident of California, became interested in the farm, which he learned was for sale at a price of $80,000. Not having himself sufficient money to finance the acquisition, Otto returned to California where, with the help of one Haas, his brother-in-law, he interested seven other persons in the Fresno area in the venture.

These individuals agreed to put up part of the money for the purchase if the ranch, after further investigation by Otto and Haas, met with their approval. The group consulted a lawyer, and were advised that the best way to handle such a transaction was to incorporate. Otto, accompanied by Haas, returned to Arizona with $2,000 "earnest money" contributed pro rata by the nine interested parties. They met with Shepard at the farm, and during the course of discussions with him the representations alleged in the complaint in this case were made concerning the history, quality, and output of a well on the farm which provided water essential to irrigate cotton—the crop in which the proposed purchasers were interested. An option agreement was thereafter executed between Shepard on the one hand and Otto and Haas on the other, secured by the payment of the $2,000. Shepard was told that a corporation, still to be formed, would take up this option, and to this he expressed no objection.

Some three months following this transaction appellee Cal-Nine Farms was incorporated. A few days later escrow instructions were issued to a Phoenix bank embodying the option agreement, naming Shepard and his wife as sellers and appellee as purchaser. The sum of $18,000 was paid upon the execution of the escrow instructions and arrangements made for the payment of the balance of $60,000 over a term of years. Otto, as president of Cal-Nine, went into possession of the ranch three months later, that is, in March of 1955.

During that year it was discovered that the well was greatly inferior in output as compared with the representations appellants had made for it. Because of the shortage of water the cotton crop of the year suffered heavy damage, and in the following year an adequate well was sunk.

Cal-Nine Farms brought this suit for damages for false representation in May of 1956. On the first day of the

trial Otto and Haas assigned to Cal-Nine all interest they might have in any such cause of action. The case was tried to the court (Judge Ling) sitting without a jury, and damages were awarded in the amount of $35,106, approximately two-thirds of which was for expense of drilling an adequate well, and the balance for crop damage suffered in 1955. Findings of fact were made supporting all elements of the cause of action for fraud.

Appellant's primary contention is that Cal-Nine Farms is not a proper party plaintiff in this action since no fraudulent representations were or could be made to it, but rather were made to individuals before the plaintiff corporation was formed. They claim that such is the law of Arizona.

The Arizona Supreme Court appears not to have passed directly on the point. However, in Deatch v. Fairfield (Ariz.), 233 P. 887, the court stated that "The test of assignability of a chose in action is whether it will survive and pass to the personal representative. If it will survive it can be assigned." The rule was reaffirmed in Employers Casualty Co. v. Moore (Ariz.), 142 P. 2d 414. Applying the rule of assignability stated in these cases it would appear that here the chose in action for fraud was assignable in 1956 when Otto and Haas assigned all interest they had to Cal-Nine. The Arizona legislature, in 1955, had by statute said that, with certain exceptions not here relevant, every cause of action "shall survive the death of the person entitled thereto." ARS § 14–477.

Appellee cites the closely analogous California case of Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 25 P. 2d 839, which held that a corporation could recover damages for fraud perpetrated upon its incorporators prior to the existence of the corporation. It was contended by the defendants in the case that the second of the two corporations there involved had no cause of action because the representations in question were not made to it, and that

the other corporation had no cause of action either. In rejecting the contention the court said that "it would indeed be remarkable if the law proved so barren that legal principal could not be found to avoid such a result." The court went on to say that even without an assignment the second corporation could maintain the action for fraud.

The testimony in respect of other phases of the case is in conflict, but the findings of the trial court have ample warrant in the record. It is claimed that appellee has not sustained the burden of proof necessary in a case of fraud. We do not agree. Nor do we see merit in appellant's argument that the proper measure of damages was not applied. The parties are in agreement that in fraud actions Arizona applies the so-called "benefit of the bargain" rule, that is, the difference in value of the thing as represented and as it actually is. There was evidence sufficient to support both the need for and the cost of the new well, and also evidence adequate to support the award for damage to the 1955 crop because of inadequate water supply.

Seeing no reason for doing otherwise, we affirm the judgment.

POPE, Circuit Judge.

I concur. The only problem that appears difficult to me is whether the trial court in assessing the damages was in error in not applying literally the standard set forth in Lutfy v. R. D. Roper & Sons Motor Co., 57 Ariz. 495, 115 P. 2d 161, 165.[1] Instead of taking testimony as to the value of the ranch as it actually was, and the value it would have had had the representations been true, the trial court took a short cut by fixing this part of the damages as the cost of a new well.

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[1] "The measure of the damages sustained by the purchaser where a purchase has been induced by fraud, is according to the weight of authority, the difference between the real value of the property purchased and the value which it would have had had the representations been true."

It seems to me that the trial court was warranted in concluding that this would be the very minimum difference between the value of an irrigated ranch which the purchasers thought they were buying, and a dry ranch, or one nearly so, which the place turned out to be. I do not think that appellants have demonstrated any prejudice resulting to them from the court's method of calculation; that method finds support in Nunn v. Howard, 216 Ky. 285, 288 S.W. 678, and in McCormick on Damages, 1935 Ed., § 122.

Furthermore there is respectable authority which the Arizona courts would probably recognize that a person defrauded may recover as one of the proximate results of misrepresentation expenses to which he has been put.[2] A case holding proper the recovery of the expenses of repairing a building to make it rentable where the purchaser had bought the building falsely represented to be rentable but found not to be so, is Wood v. Niemeyer, 185 Cal. 526, 197 P. 795, 799.

It seems to me that the recovery of expenditures for the new well is within the principles of the Restatement of the Law of Torts, Vol. IV, § 919, as follows:

> "(1) A person whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened.
>
> "(2) A person who has already suffered injury by the tort of another is entitled to recover for expen-

[2] After discussing at length the various views as to the "benefit of the bargain" and the "out of pocket" rules, which he calls the "normal" measure of damages, Prosser states, ("Law of Torts", 2nd Ed., p. 570): "In addition to such a normal measure of damages under whatever rule the court may adopt, the plaintiff may recover for consequential damages, such as personal injuries, damage to other property, or expenses to which he has been put, provided that they are regarded as 'proximate' results of the misrepresentation."

ditures reasonably made or harm suffered in a reasonable effort to avert further harm."

As for the loss of crop, it seems to me that this was plainly a proximate result of misrepresentations and that the award on account thereof was proper.

(Endorsed:) Opinion and Concurring Opinion. Filed Jan. 31, 1958. Paul P. O'Brien, Clerk.

EXHIBIT B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,599

ELMER F. SHEPARD AND KATHRYN M. SHEPARD, HIS WIFE, APPELLANTS,

vs.

CAL-NINE FARMS, A CORPORATION, APPELLEE

JUDGMENT

Appeal from the United States District Court for the District of Arizona

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment Filed and entered: January 31, 1958. Paul P. O'Brien, Clerk.

EXHIBIT C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, March 10, 1958

Before: HEALY, POPE and LEMMON, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants, filed February 27, 1958, and within time allowed therefore by rule of court for a rehearing of the above cause be, and hereby is denied.

(9753-5)

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No. [redacted]898

IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

ELMER F. SHEPARD AND KATHRYN M. SHEPARD, HIS WIFE,

Petitioners,

vs.

CAL-NINE FARMS, A CORPORATION,

Respondent.

MEMORANDUM IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

CHARLES AVERETTE CARSON, III
419 Title & Trust Building
Phoenix, Arizona,
Attorney for Respondent.

IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

No. 853

ELMER F. SHEPARD AND KATHRYN M. SHEPARD, HIS WIFE,

Petitioners,

vs.

CAL-NINE FARMS, A CORPORATION,

Respondent.

MEMORANDUM IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Pursuant to the provisions of Rule 23, Supreme Court Rules, Respondent respectfully submits the following memorandum in opposition to the Petition for Certiorari in the above-entitled case.

Federal Jurisdiction in the District Court and on appeal was based upon diversity of citizenship, 28 USC

1332, and all parties concede that the law of Arizona governs. Likewise, all parties concede that the Supreme Court of Arizona, as evidenced by the Arizona cases cited in the Petition for Certiorari, follows the so-called "benefit of the bargain" rule in measuring damages for fraudulent representations. This rule, as quoted by Petitioners in their brief, is "the difference between the real value of the property purchased and the value it was represented to have."

The only point relevant to this petition on which the parties disagree is the type of proof which may be offered under the law of Arizona to support recovery of damages in the situation of this case. The Arizona cases cited by Petitioners do not pass on this point; they simply lay down the general rule referred to above. Respondent offered at the trial evidence that the well on the land in question proved to be wholly worthless within a few months after respondent took possession, and that as a result thereof Respondent's cotton crop growing on that land was severely damaged from the resulting lack of water. (Findings XVI and XVII of the District Court, R. 38-39). Proof was then offered as to the reasonable and necessary cost of drilling a replacement well, and as to the pecuniary damage resulting to respondent from the injury to its crop. (R. 38-39). It was largely on the basis of this testimony that the trial court, sitting without a jury, awarded Respondent the judgment which Petitioners here challenge.

The trial court at no time departed from, or was in doubt about, the applicability of the "benefit of the bargain" rule in Arizona. Indeed, the findings of fact and conclusions of law specifically refer to this rule as being governing. (Conclusion of Law No. 3, R. 39). It would appear to be Petitioners' contention, though it is by no means apparent from the Petition, that the trial court in receiving proof on the issue of damages should have limited itself to the calling of a parade of expert witnesses on either side, who would testify as to the value of desert land with an operating well, and then as to the value of desert land without any well. Presumably, according to Petitioners, only on this basis would the Court be justified in awarding damages.

Admittedly, as stated in Petitioners' brief, the Supreme Court of Arizona has never "sanctioned" the commonsense method adopted by the courts* below, but on the other hand it has not disapproved it either. It has simply never had to pass on the question. The reputable authority, McCormick on Damages, 1935 ed., §122, p. 454, states that the cost of putting the property in the condition that it would have been in had the representations been true is an alternative measure of damages under the benefit of the bargain rule. In *Nunn v. Howard*, 216 Ky. 685, 288 S.W. 678, the

*Judge Pope, concurring in the Court of Appeals, said the replacement cost of the well would have been "the very minimum difference between the value of an irrigated ranch, which the purchasers thought they were buying, and a dry one . . . ." Petition, p. 11.

precise measure used below was specifically approved in a case which also involved misrepresentations as to the condition of a well. Kentucky, it should be noted, follows the same benefit of the bargain rule as does Arizona. *Gregory v. Forester*, 228 Ky. 201, 14 S.W. 2d 755. Also in accord is *Wood v. Niemeyer*, 185 Cal. 526, 197 P. 795, 797. Petitioners at no stage of this litigation have called to the attention of any of the Courts which have been asked to pass on the question a single case disapproving such a procedure.

Judge Pope, in his concurring opinion in the Court below, referred to the problem as a "difficult" one; however, it is clear that what he meant was that the problem was difficult in the sense that any undecided question of state law is bound to be difficult for a Federal Court sitting in a diversity case. Quite obviously from his concurring opinion, he was satisfied that the Supreme Court of Arizona would permit such testimony, and that justice had been done in this case.

What the question presented in this case boils down to, then, is whether this Court should attempt to predict the action of the Supreme Court of Arizona on a point upon which that Court has never passed, after the District Court and the Court of Appeals in the instant case have both agreed as to what the result would be. See *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S. Ct. 1015, 88 L. Ed. 1246. Even if the question were a doubtful one, or one on which there was a split of authority in other jurisdictions, this Court undoubt-

edly has matters before it of greater general importance which have a more legitimate claim on its time. When, in addition, all of the authorities and Courts which have passed on the point outside of Arizona have reached the conclusion that the testimonial foundation for damages in this case was correct, the case is not only of no general importance, but was obviously correctly decided below. The Petition for Certiorari is patently without merit and should be denied.

Respectfully submitted,

CHARLES AVERETTE CARSON, III
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Phoenix, Arizona,
Attorney for Respondent.